No. 406 LIBRARY
SUPREME COURT, U.S.

VOLUME I

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
AUG 27 1957
JOHN T. FEY, Clerk

IN THE

UNITED STATES

# COURT OF APPEALS

FIFTH CIRCUIT

## No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(ORIGINAL RECORD RECEIVED OCTOBER 5, 1956)

U. S. COURT OF APPEALS
FILED
NOV 2 - 1956
John A. Fenlon, Jr.
CLERK

# INDEX


| | Page |
|---|---|
| Petition for Enforcement of an Order of the National Labor Relations Board | 1 |
| Order to File Petition | 3 |
| Answer of Better Monkey Grip Company, Respondent, To Petition for Enforcement | 5 |
| Certified List of the National Labor Relations Board | 9 |
| Charge Against Employer | 15 |
| Order Consolidating Cases and Notice of Hearing | 20 |
| Complaint | 22 |
| Notice of Hearing | 26 |
| Complaint | 27 |
| Answer of Better Monkey Grip Company | 33 |
| Order | 36 |
| Intermediate Report and Recommended Order | 38 |
| Erratum | 72 |
| Exceptions of Better Monkey Grip Company to the Intermediate Report and Recommended Order of the Trial Examiner and to the Rulings of the Trial Examiner at the Hearing | 75 |
| Decision and Order | 87 |
| Petition for Reconsideration and, in the Alternative, Motion for Remand | 97 |
| Order | 140 |

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL-CIO, Case No. 16-CA-814."

In support of this petition the Board respectfully shows:

(1) Respondent is a Texas corporation engaged in business in the State of Texas, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 30, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 38 (1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board and requiring Respondent, its

officers, agents, successors and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington D. C.
this 24th day of August 1956.

---

ORDER TO FILE PETITION

In The United States Court of Appeals
For the Fifth Circuit

No. 16278

National Labor Relations Board,
Petitioner,
versus
Better Monkey Grip Company,
Respondent.

A petition for the Enforcement of an Order of the National Labor Relations Board made on April 30, 1956, the proceeding known upon the records of the Board as "BET-

TER MONKEY GRIP COMPANY and UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Case No. 16-CA-814," having been presented to this Court;

IT IS ORDERED that said petition be filed and the case docketed as of August 28, 1956; and

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the proceeding before the National Labor Relations Board, in the above entitled matter, within forty days from this date as required by Rule 38, as amended.

/s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court
of Appeals for the Fifth Circuit.

DATED:
August 28, 1956.

# ANSWER OF BETTER MONKEY GRIP COMPANY, RESPONDENT, TO PETITION FOR ENFORCEMENT

(Filed: September 17, 1956)

United States Court of Appeals for the Fifth Circuit

No. 16278

National Labor Relations Board,
Petitioner,

versus

Better Monkey Grip Company,
Respondent.

To the Honorable Judges of United States Court of Appeals for the Fifth Circuit:

Now comes Better Monkey Grip Company, Respondent, in the above entitled and numbered proceeding, and files this its answer to the petition for enforcement of an order of the National Labor Relations Board filed herein by the National Labor Relations Board, and Respondent would show the honorable Court as follows:

1.

Respondent admits paragraph (1) of the petition.

2.

Respondent admits paragraph (2) of the petition.

3.

Notwithstanding any of the admissions made in this answer, Respondent specifically denies that the Petitioner has, in law or in fact, any right whatsoever to have its order enforced, and in this connection Respondent would show that the order of the Board, its findings of fact and conclusions of law, and the findings of fact and conclusions of law contained in the Trial Examiner's Intermediate Report are not supported by the substantial creditable evidence on the record as a whole. In this connection Respondent reurges all of the exceptions urged to the Trial Examiner's Intermediate Report and to the findings of fact and conclusions of law contained therein, and likewise to the findings of fact and conclusions of law of the Board as embodied in its decision and order, including, but not confined to, the exceptions as set forth in the Respondent's motion for reconsideration filed before the said Board on the 19th day of July, 1956, and Respondent's motion to remand, also filed with said Board on the said 19th day of July, 1956; and Respondent further excepts to the Board's order denying Respondent's petition for reconsideration and motion for remand. Respondent further excepts to the Board's order dated August 24, 1956, denying Respondent's petition for reconsideration and petition for remand. Wherefore, Respondent prays that the Court deny enforcement of the Board's order in its entirety.

4.

In the alternative, the Respondent urges that this cause be remanded for the taking of additional evidence before the Board, its member, agent or agents on the questions of (1) whether or not Whaley was discharged for cause, and (2) the creditability of Whaley's testimony upon which the Trial Examiner exclusively based his findings and conclusions. In this respect Respondent would show the Court that after the hearing before the Trial Examiner Respondent discovered that in a case filed by the said Whaley a few days after his discharge in the State District Court of Dallas County, Texas, for workmen's compensation, wherein he claimed to be permanently and totally disabled as a direct result of injuries sustained a few days before his discharge, Whaley testified under oath in a deposition that he was discharged by Respondent on the occasion in question because he was physically unable to do the work. The Respondent would further show the Court that as soon as this evidence was discovered, it filed with the Board a comprehensive motion to remand, which included photostatic copies of the pages of said deposition setting out this testimony; nevertheless, the Board failed and refused to remand the case for additional evidence on that subject.

5.

Respondent in this connection would further show that the Trial Examiner's report, which constitutes the entire basis for the Board's decision and order sought to be enforced in this Court, draws findings of fact and conclusions of law from and relies principally upon the sole testimony of the said Whaley to the effect that he was physically able

to perform the work at the time of his discharge. Respondent would show that the proferred evidence as to the sworn testimony of Whaley in the workmen's compensation case above referred to conclusively shows that the testimony of Whaley before the Board constituted perjury, and that thus the findings of fact and conclusions of law of the Trial Examiner and of the Board, and the decision of the Board are based solely upon perjured testimony beyond any question and beyond any doubt.

WHEREFORE, Respondent prays that the Clerk of the Court cause notice of the filing of this answer and alternative request for a remand be served upon the Petitioner and that this Court take jurisdiction of the proceeding, and make and enter upon the pleadings evidence and testimony, and proceedings set forth in the entire certified record of said proceedings, and upon the order set forth and attached to the petition, a decree denying the Petitioner and setting aside the order of the Board, or in the alternative, to remand the case to the Board for the taking of additional evidence as herein requested, and for all other relief, in law and in equity, general and special, to which the Respondent may be entitled.

HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.
Attorney for Respondent
1133 Fidelity Union Life Building
Dallas, Texas

A true copy
Test: JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals, Fifth Circuit
By GILBERT F. GANUCHEAU
Deputy

New Orleans, Louisiana
September 17, 1956

(SEAL)

---

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

In The United States Court of Appeals
For The Fifth Circuit

---

No. 16278

---

National Labor Relations Board,
Petitioner,

versus

Better Monkey Grip Company,
Respondent.

---

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board - Series 6, as

amended, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL-CIO", the same being known as Case No. 16-CA-814 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

*VOLUME I* — *CERTIFIED RECORD*

Stenographic transcript of testimony taken before Trial Examiner Arthur E. Reyman on November 8, 1955 ..... 1 - 131

*VOLUME II* — Pleadings[1]

1. Charge filed by Upholsterer's International Union of North America, AFL on February 21, 1955 ..... 132

2. Copy of affidavit of service of charge, mailed February 21, 1955, together with United States Post Office return receipt thereof ..... 133 - 134

3. Order consolidating case with Case No.

[1]Items 1 thru 7 were marked General Counsel's Exhibit 1-A thru 1-G in the proceeding before the Board.

[1]Following the last page of the typewritten transcript, all pleadings have been consecutively renumbered, and thereafter, all exhibits. [These numbers will appear in bold-faced type on the pages of the printed appendix]. The Board's brief will refer to these pages rather than to the pages of the Board's appendix.

16-CA-742, and notice of hearing issued by the National Labor Relations Board on October 13, 1955, together with complaints and copies of charges attached 135 - 147

4. Affidavit of service of complaints, order consolidating cases, and notice of hearing, mailed October 13, 1955, together with United States Post Office return receipts thereof 148 - 149

5. Respondent's answer to complaint sworn to October 18, 1955 150 - 151

6. Copy of order withdrawing complaint and notice of hearing in Case No. 16-CA-742 issued by the Regional Director on November 4, 1955 152

7. Affidavit of service of order withdrawing complaint and notice of hearing in Case No. 16-CA-742, mailed November 4, 1955 153

**8. Copy of Trial Examiner Reyman's Intermediate Report and Recommended Order dated January 11, 1956 154 - 180

---

**Because of the large amount of typed matter on each mimeographed part of this Report, each page has been divided into two parts. The first half, or lines 1 thru 30, inclusive, constitute one page; the second half, lines 31 to the foot of the page, the following page. The renumbered pages of the Intermediate Report will have the following sequence:

| *Original Page Number* | *Renumbered Page* |
|---|---|
| 1 | 154 |
| 2 | 155 - 156 |
| 3. etc. | 157 - 158. etc. |

9. Order transferring case to the National Labor Relations Board, dated January 11, 1956 ..... 181 - 184

10. Affidavit of service of Intermediate Report and Recommended Order and Order transferring case, mailed January 11, 1956, together with United States Post Office return receipts thereof ..... 185 - 186

11. Copy of Erratum issued by the National Labor Relations Board on January 16, 1956 187

12. Affidavit of service of Erratum, mailed January 16, 1956, together with United States Post Office return receipts thereof 188 - 189

13. Respondent's exceptions to the Intermediate Report received February 16, 1956 190 - 201

14. Copy of Decision and Order issued by the National Labor Relations Board on April 30, 1956 ..... 202 - 207

15. Affidavit of service of Decision and Order mailed April 30, 1956, together with United States Post Office return receipts thereof 208 - 209

16. Respondent's petition for reconsideration of Board's Decision and Order, and, in the alternative, a motion for remand, submitted July 23, 1956, with Exhibits A thru F attached ..... 210 - 249

17. Order denying Respondent's petition for reconsideration of Decision and Order, and in the alternative, a motion for remand, issued by the National Labor Relations Board on August 10, 1956 250

18. Affidavit of service of Order denying petition for reconsideration and alternative motion for remand, mailed August 10, 1956, together with United States Post Office return receipts thereof 251 - 252

*VOLUME III*

GENERAL COUNSEL'S EXHIBITS***

G.C. No. 2 A letter dated February 18, 1955, on the letterhead of the Better Monkey Grip Company, addressed to Mr. R. L. Whaley and signed by Mr. L. M. Everett 253

G.C. No. 3 A letter dated July 21, 1954, addressed to Mr. Robert Whaley, signed by Jack Everett 254

G.C. No. 4 (Identified only) A letter dated November 7,

***Other than those enumerated in Volume II, supra.

1955 from Maurice M. Scurry, M. D. and addressed to the National Labor Relations Board 255

RESPONDENT'S EXHIBIT No. 1. Photostat of a petition in the District Court in a suit filed by Robert Whaley against the Traders and General Insurance Co., which is a suit for total and permanent disability, filed on June 2, 1955 256 - 263

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this day of

s/ Frank M. Kleiler
Frank M. Kleiler
Executive Secretary
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

132

# CHARGE AGAINST EMPLOYER

United States of America
National Labor Relations Board

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS. — File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
16-CA-814

Date Filed
February 21, 1955

Compliance Status Checked By:
ER

1. Employer Against Whom Charge Is Brought
Name of Employer
BETTER MONKEY GRIP COMPANY

Address of Establishment (Street and number, city, zone, and State)
5320 Harry Hines Blvd.
Dallas 2, Texas

Number of Workers Employed
112

Type of Establishment (Factory, mine, wholesaler, etc.)
rubber products factory

Identify principal product or service
rubber products

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) & (4) of the National Labor
(List subsections)
Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about February 18, 1955, it, by its officers, agents and employees, terminated the employment of Robert L. Whaley, because of his membership and activities in behalf of Upholsterers' International Union of North America,

AFL, a labor organization, and because said Robert L. Whaley, gave testimony under the Act in the matter of *Better Monkey Grip Company*, Case No. 16-CA-742, and at all times since said date, it has refused and does now refuse to employ the above-named employee.

By the acts set forth in the paragraph above, and by other acts and conduct, it by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
Upholsterers' International Union of North America, AFL

4. Address (Street and number, city, zone, and State)
1500 N. Broad St., Philadelphia 21, Pa.

Telephone No.
PO 57671

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
same as above

6. Address of National or International, if any (Street and number, city, zone, and State)

Telephone No.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By D. H. WOODALL
(Signature of representative or person filing charge)
D. H. Woodall, Director Region 17
2118 Volga Ave., Dallas, Texas
FRanklin 2651
(Title, if any)

February 21, 1955
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

133

United States of America
Before The National Labor Relations Board

In the Matter of

Better Monkey Grip Company
Employer

and Case No. 16-CA-814

Upholsterer's International Union of North America, AFL
Petitioner

AFFIDAVIT OF SERVICE OF
CHARGE AGAINST EMPLOYER

DATE OF MAILING February 21, 1955

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document by post-paid registered mail upon the following persons, addressed to them at the following addresses:

Better Monkey Grip Company 101820
5320 Harry Hines Blvd.
Dallas 2, Texas

Subscribed and sworn to before me
this 23rd day of February, 1955
Dorothy L. Murphy, Designated Agent.
NATIONAL LABOR RELATIONS BOARD

---

134

(Return Receipt Omitted)

135

ORDER CONSOLIDATING CASES
and
NOTICE OF HEARING

(Number and Title Omitted)

On August 25, 1955, the Board remanded Case No. 16-CA-742 to the Regional Director for the Sixteenth Region for rehearing. In addition thereto, charges, pursuant to Section 10 of the Labor Management Relations Act, 1947, 61 Stat. 161, and Section 102.9 of the National Labor Relations Board's Rules and Regulations, Series 6, having been duly filed in Case 16-CA-814, and the undersigned having duly considered the matter, and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33(b) of the Board's Rules and Regulations, that these cases be, and they hereby are, consolidated.

PLEASE TAKE NOTICE THAT on the 8th day of November, 1955, at ten o'clock in the forenoon, in Room 614C, 1114 Commerce Street, in the City of Dallas, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the complaints attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

Copies of the charges upon which the complaints are based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the complaint in 16-CA-814 (the answer to complaint in 16-CA-742 having been previously filed) within ten (10) days from the service thereof and that unless you do so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.



IN WITNESS WHEREOF the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint, Order Consolidating Cases, and No-

tice of Hearing to be signed by the Regional Director for the Sixteenth Region on this 13th day of October, 1955.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
300 West Vickery, Room 2093
Fort Worth, Texas

(SEAL)

---

137

## COMPLAINT

(Number and Title Omitted)

It having been charged by Upholsterer's International Union of North America, AFL, 1500 N. Broad Street, Philadelphia 21, Pennsylvania, under date of February 21, 1955, that Better Monkey Grip Company, 5320 Harry Hines Blvd., Dallas 2, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is, and has been since April, 1951, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the City of Dallas, Texas, and is now and has been at all times herein mentioned, continuously engaged at said place of business, hereinafter referred to as the "Plant", in the manufacture and sale of rubber tire patches, tire tread, rubber mats and related products.

138

2. Respondent, in the course and conduct of its business operations at its Plant during the last twelve months, which period is representative of all times material hereto, purchased raw materials valued in excess of $800,000.00, of which approximately $150,000.00 was shipped in interstate commerce to the Plant from points outside the State of Texas. During the same period, Respondent sold products, consisting principally of rubber tire patches, tire tread, rubber mats, and related products, valued in excess of $1,500,000.00. The entire production of the Better Monkey Grip Company during this period was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Better Monkey Grip Company. The Monkey Grip Sales Company is located at the same address and uses the same warehouse facilities as the Better Monkey Grip Company. During the past twelve months, the Monkey Grip Sales Company sold products valued in excess of $1,700,000.00, of which approximately 50 per cent was shipped in interstate commerce from the Plant to points outside the State of Texas.

3. Copy of the charge hereinabove referred to was served on Respondent by registered mail on February 22, 1955.

4. Upholsterers' International Union of North America, AFL, hereinafter referred to as the Union, is a labor organization within the meaning of section 2, subsection (5), of the Act.

5. Respondent did on or about February 18, 1955, discharge Robert L. Whaley, employed at its said Plant.

6. Respondent has, since the date of discharge listed above in paragraph 5, failed to, refused to and continues to refuse to reinstate said Robert L. Whaley to his former or substantially equivalent position or employment.

7. Respondent did discharge and refuse or fail to reinstate said Robert L. Whaley for the reason that he gave testimony on July 17, 1954, and on January 28, 1955, in a hearing before the Board in "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL, case No. 16-CA-742."



8. By the acts described above in paragraphs 5 and 6, for the reason set forth above in paragraph 7, Respondent did discriminate, and is discriminating in regard to the hire or tenure or terms or conditions of employment of said Robert L. Whaley, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8(a), subsection (4), of the Act.

9. By the acts described above in paragraphs 5 and 6, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (1), of the Act.

10. The activities of Respondent, described above in paragraphs 5 and 6, occurring in connection with the operations of Respondent, described above in paragraphs 1 and 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of section 8 (a), subsections (1) and (4), and section 2, subsections (6) and (7), of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this complaint to be signed and issued by the Regional Director for the Sixteenth Region on the 13th day of October, 1955, against Better Monkey Grip Company, Respondent herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
Sixteenth Region

(SEAL)

140

(Charge Against Employer Omitted)

141

## NOTICE OF HEARING

(Number and Title Omitted)

PLEASE TAKE NOTICE that on the 20th day of July, 1954 at ten o'clock in the forenoon, in Room 1808, 1114 Commerce St., in the City of Dallas, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of a verified answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

IN WITNESS WHEREOF, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Hearing to be signed by the Acting Regional Director for the Sixteenth Region on this 10th day of June, 1954.

ELMER DAVIS
Acting Regional Director,
National Labor Relations Board
300 West Vickery, Room 2093
Fort Worth, Texas
(Address)

(SEAL)

---

142

## COMPLAINT

(Number and Title Omitted)

It having been charged by Upholsterer's International Union of North America, AFL, 1500 N. Broad Street, Philadelphia 21, Pennsylvania, under dates of March 29, 1954 and April 6, 1954 that Better Monkey Grip Company, 5320 Harry Hines Blvd., Dallas 2, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred

to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is, and has been since April, 1951, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the City of Dallas, Texas, and is now, and has been at all times herein mentioned, continuously engaged at said place of business, hereinafter referred to as the "Plant" in the manufacture and sale of rubber tire patches, tire tread, rubber mats and related products.

143

2. Respondent, in the course and conduct of its business operations at its Plant, during the last twelve months, which period is representative of all times material hereto, purchased raw materials valued in excess of $800,000.00, of which approximately $150,000.00 was shipped in interstate commerce to the Plant from points outside the State of Texas. During the same period, Respondent sold products, consisting principally of rubber tire patches, tire tread, rubber mats, and related products, valued in excess of $1,500,000.00. The entire production of the Better Monkey Grip Company during this period was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Better Monkey Grip Company. The Monkey Grip Sales Company is located at the same address and uses the same warehouse facilities as the Better Monkey Grip Company. During the past twelve months, the Monkey Grip Sales Company sold products valued in excess of $1,700,000.00, of which approximately 50

per cent was shipped in interstate commerce from the plant to points outside the State of Texas.

3. Copies of the charges hereinabove referred to were served on Respondent by registered mail on March 30, 1954, and April 7, 1954.

4. Upholsterers' International Union of North America, AFL, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2, subsection (5), of the Act.

5. Respondent did, on or about March 24, 1954, discharge J. V. Stone, and did, on or about March 26, 1954, discharge Irene B. Stone, James Clark, Charles Burchett and Nannie Sparks, and did, on or about April 2, 1954, discharge Johnnie W. Hicks, employed at its said plant.

6. Respondent has, since the date of discharge listed above in paragraph 5, failed to, refused to and continues to refuse to reinstate the employees named above to their former or substantially equivalent positions or employment.



7. Respondent did discharge and refuse or fail to reinstate the employees named above in paragraph 5 for the reason that they joined or assisted the union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

8. Respondent, through its officers, agents and employees, from on or about March 23, 1954, to date, has soli-

cited its employees to withdraw from the Union, and has assisted them in so doing; has kept under surveillance the meeting places, meetings and activities of the Union or the concerted activities of its employees for the purpose of self-organization or improvement of working conditions; has sponsored, maintained, assisted or dominated the "Employee Committee of the Better Monkey Grip Company", and more particularly, the Respondent has done the following:

a. On or about March 25, 1954, and on or about April 15, 1954, Jack Everett, Vice President of Respondent, engaged in surveillance of union meetings being held at the Community House in Lewisville, Texas.

b. On or about April 15, 1954, L. M. Everett, President of Respondent, by and through Jack Everett, Vice President of Respondent, solicited employees of Respondent to withdraw from the Union and assisted them in so doing.

c. Since on or about March 27, 1953, and to the present time, Respondent, by and through L. M. Everett, President, Jack Everett, Vice President, and Garland Talley, Production Superintendent, has sponsored, maintained, assisted or dominated the "Employee Committee of the Better Monkey Grip Company", which is an employee committee established for the purpose of, among other things, and which exists for the purpose of, among other things, dealing with the Respondent, concerning grievances and working conditions.

9. By the acts described above in paragraphs 5 and 6, for the reasons set forth above in paragraph 7, Respondent did discriminate, and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in paragraph 5, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a), subsection (3), of the Act.

10. By the acts described above in paragraph 8, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a), subsection (1), of the Act.

11. The activities of Respondent, described above in paragraphs 5, 6 and 8, occurring in connection with the operations of Respondent, described above in paragraphs 1 and 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

12. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a), subsections (1) and (3), and Section 2, subsections (6) and (7), of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this Complaint to be signed and issued by the Acting Regional Director for the Sixteenth Region on the 10th day of June, 1954, against Better Monkey Grip Company, Respondent herein.

ELMER DAVIS
Elmer Davis, Acting Regional Director
National Labor Relations Board
Sixteenth Region

(SEAL)

---

146

(Charge Against Employer Omitted)

* * * *

147

(First Amended Charge Against Employer Omitted)

* * * *

148

(Affidavit of Service Omitted)

* * * *

149

(Return Receipts Omitted)

* * * *

150

ANSWER OF BETTER MONKEY GRIP COMPANY

(Number and Title Omitted)

Now comes Better Monkey Grip Company, a corporation duly organized in the State of Texas, hereinafter called Respondent, and files its answer to the Complaint served upon the Respondent on the 13th day of October, 1955, and would show the honorable Board as follows:

1.

Paragraph 1 of the Complaint is admitted.

2.

Paragraph 2 of the Complaint is admitted.

3.

Paragraph 3 of the Complaint is admitted.

4.

Paragraph 4 of the Complaint is neither admitted nor denied, Respondent having no information relative to the same, but Respondent insists that the burden be placed upon complainant to prove the same.

5.

Paragraph 5 of the Complaint is admitted.

6.

Paragraph 6 of the Complaint is admitted.

7.

Paragraph 7 of the Complaint is specifically denied and the Respondent says that the employee referred to was discharged for good cause and without reference to any testimony he gave in a hearing before the Board in Better Monkey Grip Company and



Upholsterers' International Union of North America, AFL Case No. 16-CA-742.

8.

Paragraph 8 of the Complaint is denied.

9.

Paragraph 9 of the Complaint is denied.

10.

Paragraph 10 of the Complaint is denied.

11.

Paragraph 11 of the Complaint is denied.

WHEREFORE, Respondent prays that upon final hearing hereof it be found that Respondent has not in any wise done the acts complained of, and that these charges be in all things dismissed, and Respondent prays for such other relief, both general and special, in law and in equity, to which it may be found entitled.

BONNEY, WADE
AND STUBBLEFIELD

By HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.

Attorneys for Respondent
1133 Fidelity Union Life Building
Dallas, Texas

THE STATE OF TEXAS )
COUNTY OF DALLAS )

BEFORE ME, the undersigned authority, on this day personally appeared HERBERT S. BONNEY, JR., the attorney of record in the above cause, known to me and having been by me duly sworn, stated on oath that the facts alleged in the foregoing answer are true and correct.

HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Herbert S. Bonney, Jr. on this the 18th day of October, 1955.

VIRGINIA LOUER
Notary Public,
Dallas County, Texas

(SEAL)

---

**152**

## ORDER

(Number and Title Omitted)

On September 17, 1955, the Board issued its Decision and Order Remanding Case to Regional Director in Case No. 16-CA-742. This Order provided, among other things, that a new hearing be held, or that the Regional Director make such other disposition of the case as he deemed advisable under the circumstances.

On October 13, 1955, the Complaint in Case No. 16-CA-814, together with Notice of Hearing and Order Consolidating Cases 16-CA-742 and 16-CA-814 was issued. Subsequent thereto, on November 4, 1955, all of the parties entered into a Settlement Agreement in Case 16-CA-742; said Settlement Agreement was approved by the Regional Director on November 4, 1955.

After due consideration of all the aspects of this matter, and in order to effectuate the purposes and policies of the Act;

IT IS HEREBY ORDERED, pursuant to Section 102.18 of the Board Rules and Regulations, and the Decision and Order of the Board remanding the case to the Regional Director hereinabove referred to, as follows:

The Complaint and Notice of Hearing in Case 16-CA-742 is hereby withdrawn subject to compliance with the Settlement Agreement herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
Suite 2093, 300 West Vickery
Fort Worth 4, Texas

Dated at Fort Worth, Texas,
on the 4th day of November, 1955.
(SEAL)

153

(Affidavit of Service Omitted)

154

IR-819
Dallas, Texas

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

(Number and Title Omitted)

Statement of the Case

This is a proceeding under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136 *et seq.*, 29 U.S.C., Supp. I. Sec. 141 *et seq.*, hereinafter called the Act.

On February 21, 1955, the Upholsterers' International Union of North America, AFL-CIO (hereinafter sometimes called the Union),[1] filed a charge against the Better Monkey Grip Company, the Respondent herein, alleging that the Respondent as an employer "has engaged in and is engaging in unfair labor practices" within the meaning of Section 8

[1]After this case was begun, the American Federation of Labor and the Congress of Industrial Organizations merged into one; the Trial Examiner hereby, by independent action, amends the name and style of the charging party.

(a), subsections (1), (3); and (4) of the Act, and as a basis of the charge the Union asserted that on or about February 18, 1955, the Respondent terminated the employment of Robert L. Whaley because of his membership and activities in behalf of the Union, and because he gave testimony under the Act in a prior Board proceeding; and that the Respondent "at all times since said date" has refused to employ him.

On October 13, 1955, the General Counsel of the National Labor Relations Board, through the Regional Director for the Sixteenth Region caused a complaint to be issued against the Respondent, which refers to the charge of the Union, and asserts that the Respondent, by the discharge of Whaley and its refusal and failure to reinstate him to his former or substantially equivalent position or employment, for the reason that Whaley "gave testimony on July 17, 1954, and on January 28, 1955, in a hearing before the Board in 'Better Monkey Grip Company and Upholsterers' Union of North America, AFL, Case No. 16-CA-742,'" has contravened and now is in violation of Section 8 (a), subsections (4) and (1) of the Act. The Respondent, by its attorney, interposed a timely answer to the complaint, denying that it had violated the Act in the respects alleged, and asserting that Whaley "was discharged for good cause and without reference to any



testimony he gave" in the prior proceeding (Case No. 16-CA-742). Case No. 16-CA-742 was brought on to hearing before Trial Examiner Whittemore on a complaint issued for

the General Counsel by the Regional Director on June 10, 1954; it concerned alleged contraventions of Section 8 (a), subsections (1) and (3) of the Act by the Respondent. The case was heard on July 17 and July 19, 1954, and on August 27, 1954, the Trial Examiner issued his Intermediate Report (I.R. 518). Thereafter, upon a motion of the Respondent to remand, further hearing took place before the same Trial Examiner on January 27 and 28, 1955; he issued his Supplemental Intermediate Report on February 9, 1955, (I.R. 639). On September 17, 1955, the Board issued its Decision and Order remanding Case No. 16-CA-742 to the Regional Director with instructions that a new hearing be held or that the Regional Director make such other disposition of the case as he deemed advisable under the circumstances. On November 4, 1955, all of the parties entered into a Settlement Agreement, approved by the Regional Director on the same day, and on that day the Regional Director filed and served an Order, providing, among other things, that

> * * * Pursuant to Section 102.18 of the Board's Rules and Regulations, and the Decision and Order of the Board remanding the case to the Regional Director . . .
>
> The Complaint and Notice of Hearing in Case 16-CA-742 is hereby withdrawn subject to the Settlement Agreement herein.

The instant case came on to be heard before the undersigned Trial Examiner on November 8, 1955, at Dallas, Texas, pursuant to an Order Consolidating Cases and Notice of Hearing, issued by the Regional Director under date of October

13, 1955.[2] On the issues raised by the complaint and answer and after disposition of or reservation of ruling on motions, the hearing went

156

forward. At the hearing, the General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue orally upon the record and to file briefs, proposed findings of fact and conclusions of law, was afforded the parties. Counsel for the General Counsel argued to the record at hearing, and counsel for the Respondent argued at hearing and subsequently submitted a brief. Arguments and brief have been considered. Motions made by the Respondent to dismiss the complaint, and to strike, on which rulings were reserved, are disposed of below.

Upon the entire record in the case, and from his observation of each witness, the Trial Examiner makes the following:

---

[2]The Order Consolidating Cases, it will be noted, was made after the Board's Decision and Order of September 17th, and before the execution of the Settlement Agreement of November 4th between the parties to Case No. 16-CA-742.

At the opening of the hearing herein, counsel for the Respondent moved to dismiss the proceeding on several grounds, one particularly to the whole of the complaint herein, because Case No. 16-CA-742 was consolidated with this case by an order of record and the two then became one case; that the one case was withdrawn by order of the Regional Director dated November 4, 1955, and that thereby the whole consolidated case was withdrawn. The Trial Examiner denied this part of the motion to dismiss on a finding that the Regional Director had followed proper procedure as required by the Rules and Regulations of the Board, and that the Respondent was in no way prejudiced by the withdrawal of the complaint and notice of hearing in Case No. 16 CA-742, after voluntary settlement.

## Findings of Fact

### I. The business of the Respondent

The Respondent, Better Monkey Grip Company, has been since April 1951, and now is a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the city of Dallas, Texas, where it is now, and at all times material hereto has been continuously there engaged in the manufacture and sale of rubber tire patches, tire tread, rubber mats, and related products. There the Respondent, in the course and conduct of its business operations during the 12-month period preceding the issuance of the complaint herein, this period being representative of the times material hereto, purchased raw materials valued at in excess of $800,000, of which approximately $150,000 were shipped in interstate commerce to the plant of the Respondent from points outside the State of Texas. During the same period, the Respondent sold products, principally rubber tire patches, tire tread, rubber mats, and related products, valued at in excess of $1,500,000. The entire production of the Respondent during these times was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Respondent, using the same address and warehouse facilities as those of the Respondent. The sales during these times of the products of the Respondent were valued at in excess of $1,700,000 of which products approximately 50 percent were shipped in interstate commerce to points outside the State of Texas.

The Respondent is engaged in commerce, and in activities affecting commerce, within the meaning of the Act.

## II. The labor organization involved

158

Upholsterers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act, admitting to membership employees of the Respondent.

## III. The unfair labor practices as alleged in the complaint

Two main questions of fact must be resolved in the disposition of this case: (1) whether Robert L. Whaley was discharged for (proper) cause, and was discharged (a) because, as a supervisor, he adhered to views contrary to the responsibilities attendant to the proper discharge of his duties and adverse to management; or (b) he was unable to discharge his duties to the satisfaction of his superiors, because of physical disability and inability, combined with an effort on his part to disparage top management through the spreading of ill-founded rumors; or (2) whether the cause of his discharge was because and only because he gave testimony in Case No. 16-CA-742, which was adverse to his employer.[3]

---

[3]There seems to be no question raised against the apparent fact that the testimony of Whaley, given on July 19, 1954, and on January 28, 1955, in Case No. 16-CA-742, was adverse to his employer, the Respondent herein. However, the Respondent at the hearing objected to any testimony from Whaley as to what he testified to in the prior proceeding, for the reason that such testimony should be considered as immaterial here, it being an admitted fact that he testified; — objection also was made to a request that this Trial Examiner review the transcript of Whaley's previous testimony. See footnote 8.

To answer these questions, it is necessary briefly to review the history of Whaley as an employee of the Respondent:

159

Whaley was employed by the Monkey Grip Company (a predecessor corporation) in about the year 1939, and was continued in employ by the Better Monkey Grip Company until his employment was terminated by the Better Monkey Grip Company on February 18, 1955. He worked as a receiving clerk and as warehouse foreman, holding the last named position on the date of his discharge. The parties agree and have stipulated that "the person named in the complaint as Robert L. Whaley was employed by the Better Monkey Grip Company as a supervisor within the meaning of the Act."

According to the testimony of Whaley at this meeting, he had sometime in March 1954, become interested in the Union, and had signed a union authorization card; that sometime in April 1954, L. M. Everett, Sr., then president of the Company, approached him in the warehouse and that during a discussion between the two men about the Union, Whaley said that he was in favor of the Union.[4] Whaley further testified that in April 1954, while he was in an office shared by him and Garland Talley, a foreman, he heard Jack Everett, then plant manager, tell Talley that he would fire anyone who signed a union card if it took him 10 years to do it, and "he had a good memory." Two or three days later,

[4] L. M. Everett, Sr. was unable to appear at the hearing herein because of a serious heart condition.

Whaley said that Jack Everett, in the presence of Talley, told them "he knew there was six of them leaders that started this union, and he knew of three of them and if he knew the other three, why, he would let them go now."[5]

Whaley further testified that on September 7, 1954, L. M. Everett, Sr. called him into his office, and asked Whaley "if I would withdraw my statement in saying that I had decided that Jack said what he did in a joking manner or that he didn't mean what he had said," and that he (Whaley) had replied that he could not change his statement; that on September 8th he was called back to Everett's office when he was again requested to change his testimony by Everett and an attorney representing



the Company, and asked if he could not sign a statement to the effect that the remarks he had attributed to Jack Everett were made in a joking manner and that he had not meant what he had said; that he then again refused to change his mind or sign a statement to that effect; and that once more on the following day, September 9th, he told Everett and his attorney that he would not sign the proposed statement. He said that on January 27, 1955, the day before the resumption of hearing on remand, he was asked by the attorney "if I was still — had my mind made up to go through with it like I said I would and wanted to know if I would consider changing my statement, and which I wouldn't do it." Whaley gave testimony the following day, January 28,

---

[5]Whaley had testified to the same effect on July 19, 1954, in Case No. 16-CA-742.

1955. According to him no company representative after that time said anything further to him concerning his appearances as a witness in the July and January hearings.[6]

A letter dated February 18, 1955, signed by the president of the Respondent Company,[7] was handed to Whaley on that day:

161

Dear Bob:

As your employment in our organization here is presently unsatisfactory to management, it is hereby terminated as of today.

In lieu of advance notice we are enclosing, in addition to your time through today, two weeks' additional pay. Since you have worked approximately six months since your last paid vacation, we are also enclosing one weeks' unused vacation pay, in line with our vacation policy.

The General Counsel by counsel earnestly contends that the record, by the evidence adduced and on the circumstances shown by the sequence of events between the time

---

[6] Each time he testified, Whaley was under subpoena directed to him by counsel for the General Counsel.

[7] Luther M. Everett, Sr. was president of the Respondent Company up until several months before this hearing, at which time he was succeeded in the presidency by Thomas L. Everett; two other sons of Luther M. Everett, Sr. occupied, at the time of the hearing herein, positions as vice president: Luther M. Everett, Jr. as vice president and secretary-treasurer, Jack Luther as plant manager.

when Whaley first testified in July 1954 and the time when he testified in January 1955, together with his discharge shortly after he testified on January 28th, shows that Whaley was discharged by reason of the fact he did testify and because of the adverse nature of his testimony to the case of the Respondent. The General Counsel points out that the statements made by Whaley, both on direct and cross-examination, at the July hearing, were brought to Whaley's attention by representatives of the Respondent almost immediately before September 18, 1954, (the date under which the Respondent moved the Board to remand the case for further hearing, and just after Trial Examiner Whittemore had issued his Intermediate Report on August 27, 1954); and that just prior to the remand hearing Whaley again was interrogated concerning the testimony he previously had given. The General Counsel asserts that "the sequence of events clearly establishes that the reason for discharge was the adverse testimony of the witness [Whaley], and he was discharged just as soon as the Respondent was able to determine that the Trial Examiner would finally hold that the



testimony was adverse."*

*At the hearing, this Trial Examiner was asked by counsel for the General Counsel to officially notice the testimony of Whaley given at the July 1954 and January 1955, hearings in Case No. 16-CA-742. This request first was denied, then upon his reversal of his first ruling, the Trial Examiner agreed to examine the prior record as requested. He has done so, and finds that testimony of Whaley then given substantially is the same as that given in the instant case. See footnote 3.

The Respondent says that Whaley was discharged for cause; — that he had become an unsatisfactory employee because his antagonistic attitude toward management, because he had made mistakes in the performance of his job, that he had spread unfounded rumors to the detriment of management, and apparently was physically and mentally unable to handle his job.

The nature of his duties and responsibilities were described by Thomas H. Everett, now president of the Respondent:

> Q. (By Mr. Bonney). Now, just tell us in some detail what his job involved and how much merchandise and how much responsibility?
>
> A. . . . he was in charge of the warehouse, that is, the warehousing inventory or both, primarily of raw materials and some products in process as well as cartons, labels, that sort of thing. Our purchases would run somewhere in the neighborhood of a hundred thousand or better dollars per month or roughly $1,200,000 a year, well over a million at any rate. His duties, of course, were to properly warehouse those materials. In that part of his job, he was more or less responsible to the production



> manager. He also of course, had to report the receipt of this merchandise, and in accurate detail because there was a great deal of money involved, and a difference, for example between a receiving

report and an invoice which we would receive from our suppliers meant either dollars out of our pocket or dollars out of the suppliers' pocket, so there is a good deal involved, and in that sense, why, he was responsible to [my] brother Luke who was in charge of the purchasing. The further responsibility within the warehousing itself, was of course, proper handling and storage of the goods because, or, rather, in order to prevent damage to the material, particularly I would say to cartons, containers which eventually would be going out to our customers in forms of finished merchandise.

According to the testimony of Luther M. Everett, Jr., vice president and secretary-treasurer of the Respondent Corporation, he, at the time of the hearing herein, had known Whaley for some 17 years. He said that Whaley received the materials purchased by him, and turned in records to confirm receipt of the materials that were supposed to have been shipped to the Company. From the testimony of Luther M. Everett, Jr., it clearly appears that Whaley was not required to keep a complete inventory record, but was definitely charged with the keeping of a system of accounting for materials on hand, on cards, which reflected or was intended to reflect the materials received and warehoused, principally in turning in "stock on hand" reports; — a sort of current system of check of materials on hand. It is asserted by the Respondent that Whaley, in the keeping of these records, was derelict in the following respects; the errors committed involved his report of materials received by quantity as distinguished from those which were invoiced and checked in, and that these errors primarily in-

volved errors in computation — that is, in multiplication or addition. For example, Whaley



is accused of reporting bags as being 50-pound bags instead of 100-pound bags, or perhaps 200 bags instead of 50 bags; that the errors in computation following these would give an erroneous result on the total of the materials received or in the warehouse. Luther M. Everett, Jr., stated that Whaley was not responsible for a complete inventory check. Upon the reception of parol evidence on these facts, counsel for the General Counsel strongly objected on the ground that the records asserted by the Respondent to have been wrongly made by Whaley would be the best evidence of whether or not Whaley was derelict in his duties in this respect. The Respondent did not see fit to introduce into evidence the records which might have shown these errors. The Trial Examiner received the testimony with a statement to the effect that, although the records might be the best evidence, he would regard the verbal testimony of Luther M. Everett, Jr., according to the weigh he thought should be accorded to it. He gives it little weight. It is asserted that Whaley should have made, column by column, on the records kept by him, whether the freight was prepaid or collect; he should have shown the number of units received, the quantity of material in each of these units and the amount of that quantity which multiplied then should have shown the total quantity then received. He was required to show a full description of the material received — not the full description shown on the invoice, but according to common terminology used in the plant — the name of the shipper, the truck line which delivered the product or ma-

terial and the gross weight of the entire shipment, including tare. In most cases, a receiving report was made for each invoice of goods delivered and billed for although, according to Luther M. Everett, Jr., one or two of these suppliers to the Company would present several invoices covering one shipment.

Whaley is said to have been warned concerning his failure to keep proper records. Admittedly, Whaley never was warned, in the sense of being charged with dereliction of duty, about these alleged failures, until after about September 1954. Luther M. Everett, Jr. could not remember whether



or not these omissions in performance of duty had been called particularly to the attention of Whaley, although he said that during the two or three months prior to Whaley's discharge there was an increase in the number of errors previously made by Whaley in his record-keeping.

Sometime early in the year 1954, at about the time Whaleys' interest in the Union had become known, he was charged with having before then spread false rumors concerning his health and his apparent inability to do his job: he was said to have remarked at various times that "the Everetts' had ruined his health."

Under date of July 21, 1954, Jack Everett, plant manager, addressed a letter to Whaley:

It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.

These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.

We feel that these malicious statements are harmful to the company and employees to the extent that we must insist they be stopped.

Any repetition of such actions will force us to request your resignation.

166

One of the so-called false rumors brought to the attention of management of the Respondent in early 1954, as noted above, was the asserted one that Whaley was accusing the "Everett family" of having ruined his health — that the Everetts (meaning L. M. Everett, Sr., and his sons, were responsible for a back injury sustained by Whaley during the course of his duties . . . Whaley denies making such a statement.

Counsel for the Respondent introduced in evidence the complaint in a matter styled *State of Texas* v. *Traders and General Insurance Co.* [District Court of Dallas County, filed June 2, 1955], a compensation case, in which Whaley,

by an attorney, alleged in alternative terms complete or partial inability to perform his duties as a workman. The Respondent apparently, by the use of this document, seeks to discredit the testimony of Whaley and at the same time show that Whaley admitted his inability to perform his job. Whaley was an hourly-rated and not a salaried employee. According to witnesses for the Respondent, not contradicted by him, he was responsible for the receiving and warehousing of many thousand dollars worth of merchandise, the keeping of records, and some physical effort involved in the handling of materials and products.[9] It appears that about 10 days before his discharge, while he was engaged in the operation of a fork-lift truck, he fell and sustained injuries which aggravated a previous weakness of his back. It seems reasonable to believe that Whaley, after his discharge, being out of employment, had a perfect right to assert a claim for compensation, as he did. This Trial Examiner cannot find that his credibility is impaired by the claims made in the complaint filed on his behalf for compensation, nor can he find that the allegations of that complaint constitute an admission by Whaley that he was unable to perform



his duties in the job previously assigned to him by his employer. The Trial Examiner, because of the troublesome questions of credibility as they developed at the hearing, gave very close attention to the demeanor of the several witnesses, including Whaley, Thomas Everett, and Luther

---

[9]The Respondent says, in its brief, that Whaley "had charge of receiving and warehousing and accounting for over $1,200,000 in raw materials per year." The record herein reflects the accuracy of this statement.

M. Everett, Jr., and has concluded and finds that at the time of his discharge Whaley was ready, able, and willing to perform his duties as a supervisor as described by the Everett brothers.

The false rumors said to have been spread by Whaley appear to be exaggerated. The effort to impair his reputation for truth and veracity failed, so far as the Trial Examiner is concerned. At the hearing Lila Belle Magee was called as a witness by the Respondent. Her testimony was to the effect that she had been told by another witness called by the Respondent, Altha Lucille Cribbs, that Whaley had told Cribbs that the Union had gotten the plant a pay raise and that it would be effective on the next paycheck. Cribbs, who had preceded Magee as a witness, testified that Whaley had told her, and another girl that "if the Union had helped any way it had brought us a raise"; that she was not in favor of the Union; and that the reputation of Whaley for truthfulness around the plant was bad. On cross-examination, it developed that Cribbs did not know what "reputation" means and her only contribution was that she would not believe Whaley. Whaley is to be believed; Cribbs is not. The complaints of management, regarding each one of the so-called rumors spread by Whaley, and the shallow evidence in support of such rumors, impels the Trial Examiner to find that these reasons for finding Whaley an unsatisfactory employee, together with his alleged inability to properly perform his duties, were not the real reasons which moved the Respondent to terminate his employment. The history of Whaley as an employee of the Respondent and its predecessor corporation, and the sudden interest of the Respondent's officials in his ability to perform his work

in a satisfactory manner after he openly expressed his favor for the

168

Union, suggests only one conclusion: He was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act. The case against him for discharge for cause is too flimsy: the testimony regarding his so-called inability to perform his duties, suddenly discovered about the time his interest in the union became known, and the accusations against him for spreading false rumors made after he had testified in July 1954, are too pat. The Trial Examiner so finds.

The Respondent earnestly urges in its motion to dismiss that on the evidence, in order for the General Counsel to show a *prima facie* case, he must prove not only that Whaley was discharged for having testified in a Board hearing, but that such discharge was (1) known to other persons who were protected by Section 7 of the Act; (2) that their rights, guaranteed under Section 7, were put in jeopardy, or prejudiced; and (3) that it is not believed on the part of the Respondent that it was the intention of the framers of the Act to provide that the mere discharge of a supervisor who previously had testified in a Board hearing is a violation of Section 8 (a) (1) *per se*. The Respondent says in its brief that the General Counsel has proved only the following facts:

1. That Whaley testified at two hearings; one on July 19, 1954, and one on January 28, 1955.

2. That his testimony was adverse to the Respondent.

3. That he was discharged on February 18, 1955.

4. That the actions of L. M. Everett, Sr. and his attorney in their efforts to persuade Whaley to "tell the truth" raises a question as to whether or not this evidence makes a *prima facie* case of a violation of Section 8 (a) (1) "bearing in mind that Whaley was a supervisor." The Respondent says that there is no evidence that there was any union activity since the first union organization movement early in the year prior to Whaley's discharge; that there is no evidence that anyone ever knew of or was affected by his discharge; and that there is no evidence that he was discharged for having testified. The Respondent argues that the only way



that it could be held that he was discharged for having testified would be to draw an inference from his own [Whaley's] testimony. The Respondent by able counsel most strongly urges, too, that if the burden of proof resting upon the General Counsel to make a case of unlawful discharge *prima facie* has been met, the Respondent has effectually overcome the facts presented by the General Counsel by the testimony of witnesses for the Respondent. The Trial Examiner does not agree. He agrees with the General Counsel that the circumstances too strongly show that Whaley was discharged because he testified at a Board hearing to the detriment of the case of his employer. The findings of fault against Whaley, and the time conditions as shown by the record herein surrounding the entire con-

troversy, seem conclusively to show that he was fired because he testified, under subpoena, against his employer.

*The Contravention of Section 8 (a) (4) of the Act*

It is provided in Section 8 (a) of the Act that "it shall be an unfair labor practice for an employer — . . .

> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; . . .

The Respondent says that Whaley was not an "employee" within this provision; that it has not been alleged or proved that, before his discharge, he was an employee as so defined in Section 2 (3) of the Act, and refers to the positive definition of "employee" contained therein in support of argument to the effect that the Congress intended, in writing this definition, that all supervisors, as a part of management, should be without the protection of the Act even if they filed charges (or a charge), or gave testi-



mony under the Act. The General Counsel says in effect that any person, from the lowliest foreman to the top of management, who has been discharged for having filed charges or given testimony in a Board proceeding, is entitled to the protection of Section 8 (a) (4); and that the word "employee" as used in this Section 8 (a) (4) is to be considered as including any person or individual defined as a supervisor by Section 2 (11) of the Act.

The pertinent provisions of Section 2 (3) are these:

> (3) The term "employee" shall include any employee, . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . but shall not include any individual employed . . . as a supervisor . . .

It seems to the Trial Examiner that, although the definition of "supervisor"[10] plainly shows the intent of the Congress to distinguish between a person or individual employed as one properly eligible to be included within a bargaining unit (an employee) and a person or individual employed as a part of management (a supervisor), that the distinction so made by definition was meant to remove the supervisor (as a member of management) from the obligation to be represented by a bargaining representative chosen by a majority of rank-and-file employees within an appropriate bargaining unit. It hardly seems possible that the framers of



the Act would choose to imply, but not say, that any super-

---

[10] Section 2 (11) of the Act provides:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

visor, called upon under subpoena to give testimony in a Board proceeding, could be discharged for so testifying, or run the risk of contempt proceedings against him for refusing to respond to a subpoena or to testify."

The legislative history of the amended Act shows that the concern of the Congress, in amending the Act in 1947, in connection with "employees" and "supervisors," was to remove supervisors from the influence of the pressures that might be exerted upon them by labor representatives or so-called rank-and-file workers, and to assure them the independence of action necessary to the performance of their duties as members of management. Representative Hartley submitted a report for the House Committee on Education and Labor (Report No. 245, 80th Congress, 1st session) in which, in a comprehensive review of the status of foremen (pp. 12-17), emphasis was placed solely on the place of the supervisor in the scheme of collective bargaining. It there was written (p. 15):

> "If management is to be free to manage American industry as in the past and to produce goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the rank and file.*"

---

"See Section 11 of the Act and Section 102.31 of the Rules and Regulations of the Board, Series 6, as amended.

Senator Taft, for the Senate Committee on Labor and Public Welfare submitted a report (Report No. 105, 80th Congress, 1st session), in which supervisory personnel was discussed (pp. 3-5). There it was written (p. 3):



> A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."

The tenor of each report, in full, shows that the concern of each house of the Congress was directed to the organization of supervisors into collective bargaining groups with the employees they were required to supervise. Each report carefully points out that the proposed legislation would not prevent anyone from organizing nor (as stated in the Taft report) prohibit any employer from recognizing a union of foremen. So far as the Trial Examiner can find, no word appears in the committee reports, or was said on the floor of either house of Congress, which would indicate any intention to remove the protection of Section 8 (a) (4) from an employee of any employer called to testify under the Act. Member Murdock, in his dissent in *Modern Linen and Laundry Service*, 114 NLRB No. 41 (D. 9483) said in part:

in connection with the discharge of a supervisor after he had given testimony under the Act:[12]

"The Board did in fact assert its jurisdiction over Respondent in a prior case, in which a hearing was conducted by a Trial Examiner designated by the Board. The Board did subpoena complainant to testify, and complainant testified against the



interests of Respondent. Complainant was discharged by Respondent less than two weeks after his testimony in the prior case was taken. The Trial Examiner found, and for the purpose of considering complainant's Motion, it must be accepted as a correct finding, that Respondent discharged complainant in violation of Section 8 (a) (4) of the Act because of his testimony in the prior proceeding before this Agency. . . .

"An orderly and responsible administration of the Act requires that the Board protect complainant and other witnesses appearing before it, to the limit of its powers. To do less undermines the authority of the Board and will result in difficulty in getting witnesses to testify in the future with the inevitable result that the Board will be hampered in its efforts to effectuate the policies of the Act."

---

[12]This was written on denial by a majority of the Board for reconsideration of the Decision and Order of the Board in the case reported in 110 NLRB 1305.

The Trial Examiner here is in accord with the meaning of the law as so aptly expressed by Member Murdock, especially since it appears that the refusal of the majority to reconsider that case was based solely upon their refusal to assert jurisdiction. In the instant case, jurisdiction previously was taken in Case No. 16-CA-742, on practically identical facts concerning the business of the Respondent and its business as it affected and now affects commerce. Nor is jurisdiction contested by the Respondent. To refuse to Whaley the protection intended to be afforded by the Act, after giving testimony, would be to fail to afford the protection to a witness which the Act contemplates.

The Trial Examiner finds that the motivation for the discharge of Whaley was because he was called to testify and did testify in Board proceedings on July 19, 1954, and again on January 28, 1955. The preponderance of proof shows that except for his expressed sympathy toward



the Union early in the year 1954, and his testimony, he would not have been discharged. His duties were such as to require close attention to his job, which he seems to have given until he was found to be "unsatisfactory" to top management.

The question as to whether a supervisor is entitled to the protection of Section 8 (a) (4) of the Act is here answered in the affirmative. In the circumstances of this case, Whaley clearly is entitled to the protection of Section 8 (a) (4) of the Act. His discharge by the Respondent was in contra-

vention of this subdivision of Section 8 (a), and the Trial Examiner so finds.[13]

*The Violation of Section 8 (a) (1)*

Having found that the motivation for the discharge of Whaley was because he gave testimony under the Act, the Trial Examiner also finds that his discharge resulted in the discouragement of the union activities of other employees of the Respondent. Whaley testified at a public hearing before the Board, and it must be inferred that many of the employees of Respondent, particularly those interested in joining the Union, were well aware of the fact that he had so testified. These employees, not being apprised of any good and valid reason for the discharge of Whaley, would necessarily conclude that his discharge was because he did testify, and that his discharge constituted warning to them by the Respondent to discontinue their interest in or activities on behalf of the Union. The Trial Examiner therefore finds that the discharge occurred in circumstances which justify a finding that the employer (Respondent) by its conduct interfered with and coerced its employees in violation of Section 8 (a)



(1) of the Act. In *N. L. R. B.* v. *Vail Manufacturing Co.*, 158 F. 2d 664 C.A. 7 (cert. den. 331 U. S. 826), the Court, in sustaining the Board's finding that the employer had vio-

[13] Cf. *John Hancock Mutual Life Insurance Co.* 92 NLRB 122, affirmed 191 F. 2d 483, 28 LRRM 2236; *Inter-City Advertising Co.*, 89 NLRB 1103, reversed on the facts at 190 F. 2d 420.

lated Section 8 (a) (1) and (3) of the Act with respect to the discharge of two supervisors, and in answering the contention of the Respondent in that case that the discharges neither encouraged nor discouraged membership in a labor organization, because of lack of knowledge of the discharges on the part of other employees, pointed out that with such knowledge, the other employees would have every good reason to fear the same treatment given to the supervisors if they showed a friendly attitude toward the Union. See also *Inter-City Advertising Co.*, 89 NLRB 1103, and *Talladega Cotton Factory*, 106 NLRB 295. In affirming the decision of the Board in *Talladega Cotton Factory*, the Court of Appeals for the Fifth Circuit found violations of Section 8 (a) (1) and (3) of the Act in the discriminatory demotion of one supervisor and the discharge of another for alleged union activities.

## Concluding Findings

The discharge of Whaley for giving testimony under the Act, with the resulting implication to rank-and-file employees that their employer would not hesitate to discharge any of them in similar case, and that it was so vigorously opposed to union activity, constituted an interference with the rights of these employees, and a direct interference with the right of the Board to require the attendance of witnesses before it in a formal proceeding.

The discharge of an employee, supervisor or not, intended to influence or to prevent the giving of testimony in a Board hearing on the part of other employees, plainly is against the policy of the Congress in entrusting the enforcement

of the Act to the Board. *N. L. R. B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (C. A. 5); *N. L. R. B.* v.



*Vail Manufacturing Co.*, 158 F. 2d 664 (C.A. 7), cert. den. 331 U. S. 835.

In *Talladega Cotton Factory*, the Court said that it saw "no reason why the Board in the exercise of its statutory discretion does not have the same remedial power to redress acts of indirect interference and restraint of ordinary employees through discharge of supervisors, as it admittedly has to redress acts of direct interference and restraint with the right of the same employees to uninhibited self-organization." The Court went on to say that a contrary claim "evinces undue preoccupation with the statutory definition [of supervisor] rather than with the underlying purpose and intent of the Act as a whole. . . ."

The motions made on behalf of the Respondent, to dismiss and to strike, are hereby denied.

## IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relations to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action which the Trial Examiner finds necessary to effectuate the policies of the Act.

177

It has been found that the Respondent discriminated in regard to the hire and tenure of employment of Robert L. Whaley on February 18, 1955, by discharging him for having given testimony under the Act. The Trial Examiner therefore recommends that the Respondent offer to Robert L. Whaley immediate and full reinstatement to him to his former or substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of such discrimination by payment to him of a sum of money equal to that which he would have earned as wages or salary from the date of his discriminatory discharge on February 18, 1955, to the date of the offer of reinstatement less his net earnings during such period in accordance with the formula set out in *F. W. Woolworth Co.*, 90 NLRB 289.

It has also been found that the Respondent by the discharge of Robert L. Whaley has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. It will therefore be recommended that the Respondent cease and desist therefrom.

On the basis of the foregoing findings of fact and upon the entire record, the Trial Examiner makes the following

## Conclusions of Law

1. By discriminating in regard to the hire and tenure of employment of Robert L. Whaley by discharging him on February 18, 1955, thereby discouraging membership in a labor organization admitting employees of the Respondent to membership, and thereby discouraging membership in other labor organizations, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a), subdivision (1) of the Act.

2. In discharging Robert L. Whaley on February 18, 1955, the



Respondent discharged him for the reason that he gave testimony under the Act, and thereby engaged in an unfair labor practice within the meaning of Section 8 (a), subdivision (4) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8 (a), subdivision (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 subdivisions (6) and (7) of the Act.

## RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, the Trial Examiner recommends that Better Monkey Grip Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of its employees in any labor organization admitting them to membership, by discriminating in regard to the hire or tenure of employment of its employees or by discriminating in regard to any term or condition of employment to discourage membership therein;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.



2. Take the following affirmative action which the Trial Examiner finds will effectuate the policies of the Act:

(a) Make whole Robert L. Whaley for any loss of pay he may have suffered by reason of the Respondent's dis-

crimination against him, in the manner provided in the Section of this Intermediate Report entitled "The remedy";

(b) Post in conspicuous places at its Dallas, Texas, plant, and in all places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's duly authorized representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice shall not be altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Sixteenth Region in writing, within twenty (20) days from the date of receipt of this recommendation, what steps the Respondent has taken to comply herewith.

Unless the Respondent shall within twenty (20) days, notify the said Regional Director in writing that it will comply with the recommendations contained herein, it is recommended that the National Labor Relations Board issue an order requiring the Respondent to take such action.

Dated at Washington, D. C., this 11 day of January 1956.

ARTHUR E. REYMAN
Arthur E. Reyman
Trial Examiner

## APPENDIX A

## NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL OFFER to Robert L. Whaley immediate and full reinstatement to his former or substantially equivalent position without prejudice to any rights or privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge on February 18, 1955.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condi-

tion of employment against any employee because of membership in or activity on behalf of any labor organization.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

181

(Order Transferring Case to the National Labor Relations Board Omitted)

* * * * *

182

(Notice Omitted)

* * * *

183, 184

(Excerpts, Series 6 Omitted)

* * * *

185

(Affidavit of Service Omitted)

* * * *

186

(Return Receipts Omitted)

* * * *

187

ERRATUM

(Number and Title Omitted)

The Intermediate Report and Recommended Order in the above-captioned matter, issued January 11, 1956, by the undersigned Trial Examiner, is incomplete in that, through inadvertence, the following clause was omitted in that part of the Intermediate Report entitled "Recommendations," which clause should have immediately followed the words "The remedy" in line 7, page 14 thereof:

"; and offer immediate and full reinstatement to him to his former or substantially equivalent position without prejudice to any rights or privileges previously enjoyed by him."

ARTHUR E. REYMAN
Arthur E. Reyman
Trial Examiner

Dated: January 16, 1956.

188

(Affidavit of Service Omitted)

* * * *

189

(Return Receipts Omitted)

* * * * *

UNITED STATES OF AMERICA

Before the

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

---

Case No. 16-CA-814

---

BETTER MONKEY GRIP COMPANY,

and

UPHOLSTERER'S INTERNATIONAL UNION OF NORTH AMERICA, A. F. L.

---

# EXCEPTIONS OF BETTER MONKEY GRIP COMPANY TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER AND TO THE RULINGS OF THE TRIAL EXAMINER AT THE HEARING

---

BETTER MONKEY GRIP COMPANY,
*Respondent.*

HERBERT S. BONNEY, JR.
1133 Fidelity Union Life Building,
Dallas, Texas,
*Counsel for Respondent.*

Warlick Law Printing Co. - Law Brief Printing - Dallas - RI-6711

191

UNITED STATES OF AMERICA

Before the
NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

---

Case No. 16-CA-814

---

BETTER MONKEY GRIP COMPANY,
and
UPHOLSTERER'S INTERNATIONAL UNION OF NORTH AMERICA, A. F. L.

---

# EXCEPTIONS OF BETTER MONKEY GRIP COMPANY TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER AND TO THE RULINGS OF THE TRIAL EXAMINER AT THE HEARING

---

Now comes Better Monkey Grip Company, Respondent in this proceeding, and makes the following exceptions to the Trial Examiner's Intermediate Report and Recommended Order and would show the honorable Board as follows:

I.

The Trial Examiner, Arthur E. Reyman, filed his Intermediate Report and Recommended Order with the Board,

192

2

and this proceedings was transferred to the National Labor Relations Board on the 11th day of January, 1956. A copy of the Intermediate Report and Recommended Order and a copy of the Order of Transmittal of the case to the National Labor Relations Board were served upon Better Monkey Grip Company by registered mail on the 12th day of January, 1956. Respondent timely filed a written request for extension of time to file exceptions and brief. The Board extended the time to file exceptions and Brief to February 17, 1956.

II.

The Respondent, Better Monkey Grip Company, will be referred to in these Exceptions as "Respondent."

III.

Respondent excepts to the overruling of its Motion, presented orally at the hearing, as set out on page 41, lines 28 to 40 of the Trial Examiner's Report, said Motion also being transcribed in the official Record of the proceedings on page 8, said Motion being to dismiss the proceedings because the complaint in Case No. 16-CA-814 was consolidated by

order of the Regional Director presented in evidence with Case No. 16-CA-742, which case was by further order of the Regional Director in evidence in this case withdrawn, thereby disposing of both Case No. 16-CA-814 and 16-CA-742; and said Motion being further to dismiss the entire complaint because it was not alleged that Whaley was an employee of the company, as defined in the Act;

193

3

said Motion was further to dismiss paragraph 8 of the complaint because neither the complaint nor paragraph 8 alleged that Robert L. Whaley was an employee, because such portion of the complaint relied upon Section 8 (a) (4) of the Act, which applies only to an employee as defined in the Act. Respondent further excepts because these motions were overruled when they were reurged at the conclusion of the proceedings and after the evidence showed that it was a stipulated fact that Whaley was a supervisor of Respondent as defined in the Act.

IV.

Respondent excepts to the Trial Examiner's interpretation of the evidence as recited on pages 42 to 48 of his Intermediate Report, because the same is not supported by the substantial evidence.

V.

Respondent excepts to the Trial Examiner's interpre- in taking judicial notice of the testimony of the witness Whaley in Case No. 16-CA-742, and particularly excepts to the Trial Examiner reading the evidence in Case No. 16-CA-742. The objection of Respondent to the introduction of the testimony of Whaley in Case No. 16-CA-742 and the ruling of the Trial Examiner were set out in the official Record on pages 16 and 19. The Trial Examiner has pointed out on page 47 of the Intermediate Report, lines 27 to 34, that he has taken cognizance of the testimony in the other case and has compared it with the testimony in this case. In this connection we would point out that the



Intermediate Report in Case No. 16-CA-742 was excepted to on the grounds of prejudice of the Trial Examiner, and the Board found that the Trial Examiner was prejudiced in his Report and remanded the case for a rehearing before a different Trial Examiner. We would point out that the present Trial Examiner has now gone into a record which is made under the supervision of the prejudiced Trial Examiner, and the Respondent has no assurance that the prejudice reflected in that Record is not now reflected in the Intermediate Report of the present Trial Examiner.

VI.

Respondent excepts to the interpretations of the evidence by the Trial Examiner, as shown on page 49. Particularly Respondent excepts to a statement of the Trial Examiner on line 8, page 51, that Whaley was admittedly never warned, because it is contrary to the evidence.

VII.

Respondent excepts to the conclusions drawn by the Trial Examiner in his Report on page 52, lines 32 to 33, page 53, and page 54, lines 1 to 4, wherein the Trial Examiner concludes that even though an exemplified copy of a petition in the District Court of Dallas County, Texas, the original of which was filed by Whaley's attorney in a suit for Workman's Compensation, undisputedly showed that Whaley claimed he was permanently disabled, or in the alternative partially and permanently disabled from performing any work, that nevertheless, Whaley should be believed when



he said that he was able to discharge his duties at the time he was discharged.

VIII.

Respondent excepts to the finding of the Trial Examiner on page 54, lines 6 to 32, and page 55, lines 1 to 14, of his Report, that the false rumors stirred by Whaley were ex-

aggerated and that the case against Whaley was too flimsy and that the accusations after he testified against Respondent in the July hearing were "too pat," because such findings are contrary to and not supported by the substantial evidence.

IX.

Respondent excepts to that portion of the Report on page 55, lines 28 to 32, page 56, and page 57, lines 1 to 2, wherein the Trial Examiner overrules the Motion of Respondent presented at the conclusion of General Counsel's testimony, as well as at the end of the trial, to dismiss because General Counsel had not made a prima facie case as a violation of 8 (a) (1).

X.

Respondent excepts to the findings and conclusions of the Trial Examiner and to that part of his Report entitled "The Contravention of Section 8 (a) (4) of the Act," contained on pages 57 to 63 of the Report, particularly where the Trial Examiner says on page 62, lines 28 to 32, and on page 63, lines 1 to 2, that a supervisor is entitled to protection of 8 (a) (4) of the Act, that Whaley as a supervisor was clearly entitled to



such protection of 8 (a) (4) of the Act, and that his discharge by Respondent was in contravention of such Subdivision of Section 8 (a) (4).

XI.

Respondent excepts to the statement in lines 5 to 8, page 62 of the Report, because the Trial Examiner again relies on facts in Case No. 16-CA-742 upon which to base his findings and conclusions: "In the instant case, jurisdiction previously was taken in Case No. 16-CA-742 on practically identical facts."

XII.

Respondent excepts to the Trial Examiner's findings found on page 63, lines 6 to 33, and page 64, lines 1 through 16, whereby he concludes that Respondent was in violation of 8 (a) (1) of the Act in the discharge of Whaley, because the pleadings and evidence do not support such finding and conclusion.

XIII.

Respondent excepts to the findings of the Trial Examiner on page 64 of the Report, lines 20 to 32, and page 65, lines 1 through 22, wherein he finds that the discharge of Whaley for giving testimony under the Act constituted an interference of the rights of employees and an interference with the right of the Board to require the attendance of witnesses before it in a formal proceeding; and wherein he concluded that the discharge of an employee, "supervisor or not," intended to influence

or to prevent the giving of testimony in a Board hearing on the part of other employees, and is plainly against the policy of Congress, for the reason that the same is not supported by the evidence and for the reason that as a matter of law a supervisor is not protected under Section 8 (a) (4) of the Act. The action of the Trial Examiner in denying the Motions of Respondent to dismiss and to strike as set out in lines 21 and 22, page 65 of his Report, is excepted to by Respondent.

XIV.

Respondent excepts to the finding that "it was so vigorously opposed to Union activity, constituted an interference with the rights of those employees * * *" (page 64, lines 22-25), because there is *no* evidence to such effect and because the Trial Examiner may have reached said finding from reading the record in Case No. 16-CA-742, over Respondent's objection.

XV.

The finding of the Trial Examiner as set out on page 65, lines 27-through 33, wherein he finds that the activities of the Respondent occurring in connection with the operations of Respondent have a close, intimate, substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstruct-

ing commerce and the free flow of commerce, because there is no evidence to support such finding or conclusion.

198

8

XVI.

Respondent excepts to that portion of the Trial Examiner's Report entitled "The Remedy," wherein he recommends that the Respondent cease and desist from certain unfair labor practices and take certain affirmative action which Trial Examiner finds necessary to effectuate the policies of the Act; to page 66, lines 11 through 24, wherein he states that Respondent discriminated in regard to the hire and tenure of employment of Robert L. Whaley on February 18, 1955, by discharging him for having given testimony under the Act; wherein the Trial Examiner recommends that Respondent offer Robert L. Whaley immediate and full reinstatement to his former, or substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of such discrimination by paying to him a sum of money equal to that which he would have earned as wages or salary from the date of his discriminatory discharge on February 18, 1955, to the date of the offer of reinstatement, less his net earnings during such period, in accordance with the formula set out in W. F. Woolworth Company, 90 NLRB 289, for the reason that such findings and recommendations are not in accordance with the testimony in the Record, the substantial evidence being that Robert L. Whaley was discharged for cause, that he was a supervisor and not entitled to

protection under Section 8 (a) (4) of the Act, and since there is no showing by any evidence that Robert L. Whaley



has lost any wages or salary by reason of his discharge, or that he has attempted to get other employment, but in fact the Record shows that Whaley, by his own admission in his Workmen's Compensation suit, declared himself totally and permanently disabled and unable to perform the work for which he had been employed.

XVII.

Respondent excepts to page 66, lines 26 through 30 of the Report, wherein it says that it has been found that Respondent by the discharge of Whaley has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and wherein it is said that it will be recommended that Respondent will cease and desist therefrom, for the reason that the evidence does not support such finding or recommendation.

XVIII.

Respondent excepts to the following conclusions of law recited on page 67, lines 3 through 30 of the Report, to wit, (a) wherein he concludes that the Respondent is engaging in unfair labor practices within the meaning of Section 8 (a) (1); (b) wherein he concludes that Respondent engaged in unfair labor practice within the meaning of 8 (a)

(4) of the Act; (c) wherein he concluded that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the

200

10

Act by interfering with, restraining and coercing its employees; (d) wherein he concludes that such unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2, Subdivision 6 and 7 of the Act.

The aforementioned conclusions of the Trial Examiner are incorrect conclusions of law, and there are no facts in the Record to warrant such conclusions of law.

XIX.

Respondent excepts to all of the recommendations of the Trial Examiner found on page 68, lines 3 through 24, and page 69, of the Report, and excepts to all of the Notice to all Employees shown as Appendix A attached to the Report, for the reason that they are not supported by the evidence.

XX.

Respondent excepts to the Erratum dated January 16, 1956 and filed with the Board by the Trial Examiner, wherein he recommends that Respondent "* * * and offer immediate and full reinstatement to him to his former or substantially equivalent position without prejudice to any

rights or privileges previously enjoyed by him," because same is not supported by the evidence or the law.

WHEREFORE, respondent prays that the above exceptions be sustained and that the intermediate report of the trial examiner be set aside and that the Board substitute



its own findings and conclusions to the effect that the Respondent is not guilty of any of the acts complained of and that these proceedings shall be in all things dismissed.

BETTER MONKEY GRIP COMPANY
*Respondent.*

By HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.,
1133 Fidelity Union Life Building
Dallas, Texas.
*Counsel for Respondent.*

A copy of these exceptions have been served upon the following persons by registered mail: Mr. Harrison C. Thompson, Jr., Counsel for General Counsel, 300 West Vickery, Fort Worth, Texas; Mr. D. H. Woodall, Representative of Upholsterer's International Union of North America, AFL-CIO, 2118 Volga Street, Dallas, Texas.

D-9837
Dallas, Texas

## DECISION AND ORDER

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts his findings, conclusions and recommendations with the modifications and exceptions noted below.

We agree with the Trial Examiner that the Respondent discharged Whaley because he gave testimony adverse to its interests in an earlier Board proceeding (Case No. 16-CA-742),[1] and not because of his asserted deficiencies as a super-

[1] We do not adopt the Trial Examiner's finding which indicates that Whaley was also discharged for his Union sympathies. Not only is this ground not urged as a reason for the discharge, but the record does not support such a finding.

visor, as the Respondent contends.[2] We find, as



did the Trial Examiner, that this conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organizational rights within the meaning of Section 8 (a) (1) of the Act. In our opinion, the net effect of Whaley's discharge was to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank

---

[2] In finding that the Respondent's asserted reasons for Whaley's discharge were a pretext, the Trial Examiner, among other things, gave little weight to the oral testimony given by the Respondent because the best evidence was the written records which were not produced. Contrary to the Respondent's contention, the Trial Examiner did not mislead the Respondent into not producing these records. A reading of the entire colloquy between the Trial Examiner and counsel discloses that the records were not produced voluntarily and that the parties understood that the nonproduction of the records would affect the weight to be given to the oral testimony.

For the purpose of correcting and clarifying certain statements in the Intermediate Report, we note that Luther M. Everett, Jr., the Respondent's vice-president, testified that he called Whaley's attention to his errors in record keeping, but that he never threatened him with discharge for these errors. We also note that Whaley did not expressly deny spreading a rumor that the Respondent was ruining his health. However, when questioned under cross-examination whether he had admitted to Thomas Everett at the time he was reprimanded for circulating this rumor that he had said "some things like that," Whaley testified that he did not say "ruining my health — because I didn't say it that way." In addition, the Trial Examiner inadvertently failed to mention that Whaley denied that he circulated a rumor about the Union getting employees a raise, although the Trial Examiner stated that he believed Whaley and disbelieved employee Cribbs who testified to the rumor.

and file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act adverse to their employer. For these reasons, we find that Whaley's discharge violated Section 8 (a) (1) of the Act.[3] In view of this determination, and as the remedy, which we discuss below, would be the same, we find it unnecessary to consider whether the discharge also violated Section 8 (a) (4) of the Act.



## The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (a) (1) of the Act, we shall order it to cease and desist from its unlawful conduct and take affirmative action necessary to effectuate the policies of the Act.

We have found, in agreement with the Trial Examiner, that Whaley's discharge interfered with, restrained and coerced nonsupervisory employees in the exercise of their statutory rights. Therefore, in order to restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act, we shall provide for

---

[3] Cf. *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 215-217 (C. A. 5), enforcing 106 NLRB 295, 295-297; *N.L.R.B.* v. *Vail Mfg. Co.*, 158 F. 2d. 664, 666-667 (C. A. 7) enforcing 61 NLRB 181, 182-183, cert. denied 331 U. S. 835; *Inter-City Advertising Company*, 89 NLRB 1103, 1106-1108, enforcement denied on this point on other grounds, 190 F. 2d 420, 422 (C. A. 4).

Whaley's reinstatement with back pay, as prescribed in the Intermediate Report.[4] However, in accordance with the Board's customary policy, back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties.

We shall further enjoin the Respondent from in any other manner infringing upon its nonsupervisory employees' rights guaranteed in Section 7 of the Act. We find that such an order is necess ry to satisfy the remedial objectives of the Act because the Respondent's unfair labor practices reveal an attitude of opposition to the purposes of the Act.[5]

## ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any

---

[4] *N.L.R.B. v. Talladega Cotton Factory, Inc., supra; Inter-City Advertising Company, supra.*

[5] Cf. *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 536 (C. A. 4).

witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order herein;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time-cards,

personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto as an appendix.* Copies of said notice to be furnished



by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, as to what steps it has taken to comply herewith.

---

*In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Dated, Washington, D. C. April 30, 1956.

Boyd Leedom, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member
Philip Ray Rodgers, Member
Stephen S. Bean, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)



## APPENDIX

## NOTICE TO ALL EMPLOYEES
## PURSUANT TO
## A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their right to self-organization, to form labor or-

ganizations, to join or assist UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order issued in this case.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

208

(Affidavit of Service Omitted)

209

(Return Receipts Omitted)

UNITED STATES OF AMERICA

---

Before the
NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

---

Case No. 16-CA-814

---

BETTER MONKEY GRIP COMPANY,
and
UPHOLSTERER'S INTERNATIONAL UNION
OF NORTH AMERICA, A. F. L.

---

BETTER MONKEY GRIP
COMPANY,
*Respondent.*

HERBERT S. BONNEY, JR.,
1133 Fidelity Union Life
Building,
Dallas, Texas,
*Counsel for Respondent.*

Warlick Law Printing Co. - 1207 Hord Street - Dallas - RI-6711

# INDEX


| | Page |
|---|---|
| I. Petition for Reconsideration | 2 |
| II. Motion for Remand | 27 |


## List of Authorities


| | |
|---|---|
| Inter-City Advertising Company Case, 89 N. L. R. B. 1103 | 26 |
| N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209 (C. A. 5) | 23, 25 |
| N. L. R. B. v. Vail Manufacturing Company, 158 F. 2d 664 (C. A. 7), cert. denied, 331 U. S. 835 | 19, 23 |




## PETITION FOR RECONSIDERATION, AND, IN THE ALTERNATIVE, MOTION FOR REMAND

(Number and Title Omitted)

Now comes Better Monkey Grip Company, Respondent in this proceeding, and files herewith its Petition for Reconsideration, requesting that the Board vacate its Decision and Order and dismiss the complaint in its entirety; or, in

the alternative, by its Motion for Remand, that the Board remand the proceeding for the purpose of



taking evidence on the matter of whether Robert L. Whaley, whose discharge is the gravaman of the complaint herein, is physically able at this time to perform the duties which would be required of him if reinstated to his former position as ordered by the Board.

## I. PETITION FOR RECONSIDERATION

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above entitled proceeding in which he found that the Respondent's action in terminating the employment of Robert L. Whaley, a supervisor, constituted a violation of Section 8 (a) (1) and 8 (a) (4) of the Act. In accordance with these conclusionary findings, the Trial Examiner recommended, *inter alia*, that the Respondent be ordered to offer to Whaley immediate and full reinstatement to his former or substantially equivalent position and to make him whole for any loss of pay he may have suffered as a result of Respondent's action in terminating his employment. On April 30, 1956, the Board, in its Decision and Order, adopted the Trial Examiner's finding that Whaley had been discharged because "he gave testimony adverse to (the Respondent's) interest in an earlier Board proceeding. (Case No. 16-CA-742)" and that such conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organiza-

tional rights within the meaning of Section 8 (a) (1) of the Act. The Board, however, did not find, as did the Trial Examiner, that the alleged conduct of the Respondent also constituted a violation of Section 8 (a) (4) of the Act.

214

3

The Respondent, by its petition herein, respectfully urges: (1) That the General Counsel has failed to prove a *prima facie* case; and (2) that the Trial Examiner's findings, as adopted by the Board, are not supported by substantial evidence on the record as a whole for the following reasons: (a) The evidence presented by the General Counsel in support of the charges set forth in the complaint does not sustain the Trial Examiner's inference that in terminating Whaley's employment the Respondent was motivated by illegal purposes, (b) that there is no evidence in the record that the discharge of Whaley from his supervisory position constituted, in any manner, interference with, restraint, or coercion with the self-organizational rights of the rank and file employees, and (c) that the record evidence does not support the Trial Examiner's factual conclusion that Whaley was discharged because he gave testimony adverse to the interests of the Respondent at a Board hearing. On the contrary, the Respondent urges that the weight of the evidence sustains its contention that Whaley's employment was terminated because his services were generally unsatisfactory to the Respondent. The Respondent, therefore, respectfully requests that the Board review the record evidence in this proceeding and, in accordance with

the arguments presented below, vacate its Decision and Order herein and dismiss the complaint in its entirety.

In its reconsideration of the record evidence, the Board is urged to take into consideration the fact that the record herein, upon which this case must be decided in its entirety, is completely devoid of any evidence, other than the one

215

4

uncorroborated statement of Whaley that he overheard Jack Everett make a statement to Supervisor Talley that he would fire anyone who signed a union card, showing anti-union animus on the part of Respondent. Thus, it is highly significant *there is no evidence herein that:*

(1) Any statements or threats against union organizational efforts were made to the rank and file employees by any person allied with management;

(2) Management took any course of action to actively defeat the union organizational efforts;

(3) Any employee was discharged for engaging in union activities or that any employee was discriminated against for such activity;

(4) Any employee was told or led to believe that Whaley's services were terminated because he gave testimony at a Board hearing, or that, in fact, any statement

was ever made to anyone about Whaley's loss of employment and the reasons therefor.

The General Counsel, in his attempt to prove the allegations set forth in the complaint, called one and only one witness, namely Robert L. Whaley. Whaley's testimony, which constitutes the entire testimony offered in proof of the General Counsel's case, in Case No. 16-CA-814, if credited in its entirety, merely discloses the following:

(1) That Whaley was employed by the Respondent as a warehouse foreman; that his employment was terminated on February 18, 1955, for the reason, as expressed in a



letter to Mr. Whaley, that his employment was "presently unsatisfactory to management";

(2) That in or about March, 1954, while employed in a supervisory position, Whaley became interested in a labor union and became a member thereof;

(3) That in April, 1954, Whaley talked to Mr. L. M. Everett, Sr., who was president of the Respondent at the time, concerning his relationship with the union and that, according to Whaley's testimony, "he told me that he didn't know why we did want to go (union), but if we did he would be willing to go along with it"; that Whaley informed Mr. L. M. Everett, Sr., that he was in favor of the union;

(4) That Thomas Everett, the Respondent's president at the date of the hearing, told Whaley, in response to a statement by Whaley that he thought he would be fired for engaging in union activities, that nobody would be fired because they were in the union. This conversation developed during a conference between Thomas Everett and Whaley wherein Everett admonished Whaley for spreading false rumors that the Respondent was ruining his health and asked that Whaley stop making such statements. (Tr., pp. 36-37.)

(5) That Whaley overheard a conversation between Jack Everett, plant manager, and Garland Talley, another supervisory employee, in which Everett allegedly made a remark that "he would fire everyone that signed a union card if it took him ten years to do it and that he had a



good memory"; that approximately three days after overhearing this conversation, he heard Jack Everett make a remark that he knew three of the six leaders that started the union activities and that if he knew the other three he

would "let them go now";[1] and that Whaley testified in the proceedings before the Board that he heard such a remark.

(6) That on July 21, 1954, subsequent to his talk with Thomas Everett, wherein Thomas Everett told Whaley he wanted the untrue rumors Whaley was spreading to the effect that the Respondent was ruining his health stopped,

---

[1]This is the testimony which the Trial Examiner finds was adverse to the interests of the Respondent and which served as the motivating factor in his discharge. It is significant to note that there is no evidence in the record of this case that any employee was discharged or threatened in any manner whatsoever because of his union activity; also, that although Whaley's union activities, which, of course, are completely unprotected under the Act, were fully known in March or April, 1954, Whaley's services were not terminated until almost a year thereafter. It is also highly significant that, notwithstanding the fact that Whaley's testimony that Jack Everett made such a statement is completely uncorroborated, the General Counsel did not attempt to show at the hearing through the direct testimony of Talley that this conversation between Jack Everett and Talley, which is vital to and the essence of the General Counsel's case, actually occurred. There is no evidence in the record that Talley's testimony was unavailable to the General Counsel. Perhaps the true reason why Talley was not called by the General Counsel as a witnes was that Talley testified at the prior hearing that he did not hear any such conversation.

The Respondent contends that the General Counsel not only had the burden of proving that Whaley made a statement adverse to the interests of the Respondent in a prior hearing before the Board, but that such testimony was in fact true. Otherwise, even if it be proven that such testimony, given under oath, were false, an employer would have no recourse against the employee regardless of how blatent the falsehoods might be. The Respondent, therefore, does not believe that proof of the mere fact that Whaley gave such testimony in a prior hearing is sufficient for the proof of a prima facie case in this proceeding, and that having failed to prove by a preponderance of the evidence that such prior testimony was true, the General Counsel has failed to sustain its burden of proof.

7

Jack Everett addressed a letter to Whaley which read as follows:

> "It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.
>
> "These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.
>
> "We feel that these malicious statements are harmful to the company and employees to the extent that we must insist that they be stopped.
>
> "Any repetition of such actions will force us to request your resignation."

(7) That Whaley, an active union adherent, testified in answer to the question, "you were fighting management pretty much weren't you," "I don't think so, not too much."[2]

---

[2]This sworn testimony must on its face be construed as an overt admission that Whaley was in fact fighting management officials — the only question was the extent of his fight or opposition to management.

(8) That on September 7, 1954, during the period between the first hearing before the Board in Case No. 16-CA-742, in July, 1954, and the second hearing in January, 1955, L. M. Everett, Sr., the Respondent's president, called Whaley in and attempted to find out whether the statement attributed to Jack Everett by Whaley that he would fire everyone who signed a union card was actually made; that L. M. Everett, Sr., did not believe such a statement had



been made; that Everett did not ask him to lie about the matter; that on the following day Mr. L. M. Everett, Sr., again called Whaley in so that Respondent's counsel could talk to him; that in the discussion that followed Respondent's counsel, in Whaley's own words, "kept on wanting me to tell him the *truth*" about the situation and inquired of him whether he wished to change his statement; that nothing else was said to him on the subject until the day before the hearing in January, 1955, when he was again asked by Respondent's counsel if he would consider changing his statement;[3] and that nothing more was ever said to him about the matter;

(9) That Luke Everett called to Whaley's attention errors in the reports which Whaley was responsible for keeping; that Luke Everett called his attention to these errors

---

[3]The record shows that Everett had good cause, in view of the false rumors spread by Whaley, for doubting the truth of Whaley's testimony.

on more than one occasion; and that Whaley, in effect, admitted making such mistakes;[4]

(10) That after the termination of his services, Whaley, through his attorney, filed a suit claiming a "permanent



disability";[5] that, on occasion, in the performance of his

---

[4]As indicated in the Intermediate Report (p. 53, lines 31-34), Whaley, in discharging his responsibilities as foreman of the Respondent's warehouse, had charge of receiving and accounting for over $1,200,000.00 in raw materials per year. Notwithstanding (1) Whaley's admission of making errors in his record keeping, (2) the uncontroverted testimony that the type of errors charged against Whaley were costly to Respondent, (3) and that the number of errors increased during the last two or three months of Whaley's employment, the Trial Examiner lightly passes over or minimizes the serious nature of these errors in record keeping which he merely refers to as "errors of computation — that is, in multiplication or addition." Suffice it to state that the reason Whaley was employed was for the express purpose of rendering correct and reliable records to the Respondent, and that records marked with "errors of computation" are neither correct nor reliable.

[5]At the hearing Whaley denied that his workmen's compensation suit claimed total disability. The official records, however, shows this to be an untrue statement, which Trial Examiner, despite its falseness, expressly finds, for some inexplicable reason, did not "impair" his "credibility as a witness."

duties, Whaley was required to handle heavy bales of rubber.*

As set forth in the Intermediate Report (p. 48, lines 1-37), the Respondent contends that Whaley's services were terminated for cause — that he had become an unsatisfactory employee because of his antagonistic attitude toward management, because he made mistakes and errors in the performance of his record keeping responsibilities, that he spread untrue rumors detrimental to management, and because he was apparently physically and mentally unable to handle his job. In conjunction with the evidentiary statements made by Whaley, it is recalled that Whaley was the *only witness* called by the General Counsel.

The Respondent respectfully contends that if the Board will re-examine the record evidence it will see, as the Respondent urged before the Trial Examiner and in its brief before the Board, that the General Counsel, through the uncorroborated testimony of its only witness Whaley, has

---

*Notwithstanding his claim that he could physically perform his work at the time his services were terminated, Whaley stated in the petition (Tr., p. 35) filed in his suit for workmen's compensation (1) that he "had been unable to perform the normal task of a workman in his employment and has been unable to do any manual work or labor whatsoever"; (2) that he "has lost the use of his back, as a matter of fact, the ability to do any work whatsoever"; and (3) that he is unable to perform any kind or character of manual work to which he has been accustomed. In his Intermediate Report (p. 53, line 25 through p. 54, line 4), the Trial Examiner strangely concluded, on the basis of the "demeanor" of the witness, that "at the time of his discharge Whaley was ready, able and willing to perform his duties as described by the Everett brothers."

failed to prove a *prima facie* case that Whaley was discharged because he gave testimony adverse to the interests of the Respondent in a prior hearing before the Board. However, if the Board concludes that the testimony adduced by the General Counsel is sufficient to make out a *prima facie* case, then the Respondent contends that a review of the record testimony will reveal that the findings, conclusions and recommendations of the Trial Examiner are not supported by the preponderance of evidence on the record as a whole.

In defense of its conduct and the charges made against it, the Respondent, through its counsel, presented evidence at the hearing as follows:

1. Altha Lucille Cribbs, who has been employed by the Respondent for 8 years and who during such period of time has been acquainted with Whaley, testified that Whaley did not have a reputation for truth and honesty in the plant, but, rather, that he had a reputation for not telling the truth (Tr., p. 57); that Whaley made the statement, after a hearing before the National Labor Relations Board, to her and an Opal McElroy that "if the union hadn't helped any way, it had brought us a raise on the next pay check." (Tr. p. 56.)

2. Lila Belle Magee testified that a few days after Whaley's remark to Cribbs about the "raise," Cribbs told her about his statement. (Tr., p. 67.)

3. That, as indicated herein, under date of July 21, 1954, Jack Everett, having heard from some source about Whal-



ey's conduct and statements among the employees, found it necessary to write Whaley about his making untrue statements concerning the NLRB hearing to the effect that he (Whaley) had licked the company, that in his letter Everett informed Whaley that his malicious statements were harmful to both the company and the employees. (See I. R., p. 51, line 30 through p. 52, line 17.)[7]

(4) That Thomas Everett found it necessary to talk to Whaley in March or April, 1954, about the untrue, false rumors and statements Whaley was circulating in the plant prior to the election in the representation case; that during this conversation Whaley admitted, inferentially, spreading

---

[7]Notwithstanding (1) Whaley's failure to expressly deny statements that he had circulated rumors through the plant; (2) the fact that he had been called into the office by Thomas Everett who admonished him for circulating false rumors; (3) that Jack Everett had on another occasion found it necessary to write him concerning rumors and statements that had come to his attention which had been spread in the plant by Whaley; (4) the testimony of Cribbs that he told her the union efforts had brought them a raise, which incidentally was never granted by Respondent; (5) the testimony of Magee that Cribbs had told her of Whaley's remark shortly after it was made, the Trial Examiner finds that the false rumors appear to be exaggerated and that the evidence in support of such rumors is shallow." In view of Whaley's failure to expressly deny or disavow the fact that he spread rumors detrimental to the Respondent among its employees, and his admission that to some undisclosed extent he was fighting management, an obvious breach of the allegiance owed by a supervisor to his employer, the Trial Examiner's conclusions are almost incredible.

tales and the matter of his back injury, which resulted from the fall of a bale of rubber from a fork lift.

(5) That according to the uncontradicted testimony of L. M. Everett, Jr., the Respondent's operational manager and purchasing agent who was one of Whaley's immediate supervisors, he called Whaley's attention to mistakes many times, and that the number of mistakes committed by



Whaley during the last two or three months of his employment increased to the extent of being a nuisance, and that these errors were one of the factors considered in discharging Whaley. (Tr., p. 118.)*

*With reference to the remark made by the Trial Examiner about the failure of the Respondent to put into evidence actual records showing the errors committed by Whaley (I. R., p. 50, lines 12-23), the Respondent strongly urges that if the Board will review the record evidence (Tr., pp. 106-107) it will discover that the narration set forth in the Intermediate Report by the Trial Examiner does not properly reflect the true facts. The record evidence discloses that while testimony was being elicited from Luther M. Everett, Jr., concerning the errors committed by Whaley, the General Counsel's representative objected to this line of questioning, contending that the records themselves were the best evidence of the errors and that such records should be introduced. Thereupon, after the Trial Examiner had overruled the objection to the testimony being given, counsel for the Respondent, although stating to the effect that the introduction of records themselves would prolong the hearing, offered to produce such records. At this point in the hearing the Trial Examiner replied, "No, I would assume that through the witness you could explain the nature more precisely in the record keeping." There is absolutely *no basis in the record evidence* for the Trial Examiner's statement (I. R., p. 50, lines 19-21) that the "Trial Examiner received the testimony with a statement to the effect that, *although the records might be the best evidence*, he would regard the verbal testimony of Luther

*(Continued on Following Page)*

6. That the decision to terminate Whaley's employment resulted from a conference between L. M. Everett, Sr., L. M. Everett, Jr., and Thomas Everett; that such decision was the "summation of several factors: (1) mistakes and errors made in the discharge of his responsibilities, (2) his overall attitude, (3) his disturbing and disruptive influence within the plant, (4) the fact that he was antagonistic



toward management to the extent he could not carry out his responsibilities as a supervisor, and (5) his physical inability to properly handle his duties. (Tr., pp. 86, 87.)

7. That Luther M. Everett's testimony corroborated the testimony given by Thomas Everett that the decision to terminate the employment of Whaley resulted from a conference in which they discussed: (1) his physical ineptness and general attitude, (2) the need for harmonious relations

---

*(Continued from Preceding Page)*

M. Everett, Jr., according to the weight he thought should be accorded to it." (Emphasis added.) The record simply does not show that any such statement was made by the Trial Examiner and the Board's attention is respectfully directed to the transcript of the testimony given at the hearing. Moreover, there is no basis in the record evidence for the Board's finding (see footnote[2] of the Board's Decision and Order) that the "records were not produced voluntarily and that the parties understood that the nonproduction of the records would effect the weight to be given to the oral testimony." As indicated, counsel for the Respondent offered to produce such records. Respondent would show that such records for approximately the last year of Whaley's employment disclosed that during the last three months of his employment the incidence of his errors increased 230 per cent.

among the employees as a group, (3) Whaley's apparent inability to command the respect of his fellow employees, and (4) the fact that he actually "irritated the other employees in one way or another such as the false rumors and so forth." (Tr., pp. 111 to 113.)

Upon a reconsideration of all the evidence in this proceeding, the Board will readily see that the Trial Examiner was guilty of fallacious reasoning on several counts. The Trial Examiner in his Intermediate Report (I. R., p. 54, lines 30-32, and p. 55, lines 1-12) states that:

> "The history of Whaley as an employee of the Respondent and its predecessor corporation, and the sudden interest of the Respondent's officials in his ability to perform his work in a satisfactory manner after he openly expressed his favor for the Union, suggests only one conclusion: *He is discharged because of his known views concerning the Union and because he testified in a proceeding under the Act. The case against him for discharge for cause is too flimsy:* the testimony regarding his so-called inability to perform his duties, suddenly discovered about the time his interest in the union became known, and the accusations against him



> for spreading false rumors made after he had testified in July 1954, are too pat. The Trial Examiner so finds." (Emphasis added.)

With respect to these findings, the Respondent respectfully directs the Board's attention to the fact that there is no evidence disclosing that, as regards Whaley's work, there was any *"sudden interest* of the Respondent's officials in his ability to perform his work in a satisfactory manner after he openly expressed his favor for the union." The evidence merely discloses that his errors increased in frequency during the last two or three months of his employment to the point of becoming a "nuisance." The Trial Examiner found that this *sudden interest* suggested *"only one conclusion:* He was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act." (Emphasis added.) Although the Board did not adopt the finding that Whaley was discharged for his union sympathies, it is apparent from a reading of the Intermediate Report that this was the principal theory followed by the Trial Examiner in his entire approach to the case, and that, in all probability, such theory affected his credibility findings. The Trial Examiner's finding that Whaley was discharged because of his union views* overlooks a highly patent fact — a fact so obvious that it is incomprehensible that the Trial Examiner did not see it — that Whaley, as a supervisor, was not protected for his views and activities concerning the union organization-



al effort. Thus, *at any point of time* the Respondent had it

*The Trial Examiner, inasmuch as this theory is the first set forth in the Intermediate Report, apparently considered it the primary factor in Whaley's discharge.

so seen fit, could have discharged Whaley for such views and activities with impunity. When viewed in this context, the facts readily disclose that the Respondent's conduct was most tolerant, particularly when the fact is taken into consideration that Whaley, as a supervisor, was closely allied to management and to the proper fulfillment of its policies — a position quite incompatible, as recognized by the Act, with his union and rumor spreading activities. It is to be remembered that the Respondent's president talked with Whaley about the union activity in early 1954, and Whaley readily admitted that he was told if the employees wanted a union "he would be willing to go along with it." Yet, Whaley, who could have been discharged at this time because of his known union views, was not even reprimanded or reminded of the need of his loyalty to management. There is no evidence that Whaley ever suffered any single act of discrimination because of his union support prior to the date his employment was terminated, approximately a year later. Moreover, there is no evidence in the record of this case that any employee ever suffered a single act of discrimination because of union activity.

The Trial Examiner states that "the case against him for discharge for cause is too flimsy." "For cause" must carry some special connotation for the Trial Examiner, like dishonesty or some high crime or treason. Not only would Whaley's union activities, which must be construed an overt manifestation of his belief in principles inconsistent to some degree with his responsibilities and the loyalty

that an employer can demand of its supervisory personnel, have constituted sufficient reason, if there need be a reason, to discharge Whaley, but the record discloses that Whaley had further supplied the Respondent with other good reasons for resorting to the action taken. In view of the testimony indicating that one of the primary factors which caused the termination of Whaley's employment was his spreading of rumors detrimental to the interests of the Respondent, it is highly significant to note that Whaley did not at any time during the hearing, although given every opportunity to do so, deny spreading any rumors among the Respondent's employees.[10] In view of the record testimony, the Trial Examiner's statement that the "accusations against (Whaley) for spreading false rumors made after he had testified in July, 1954, are too pat" is unwarranted, and indeed strange, when read in conjunction with his previous statement (See I. R., p. 38, lines 20-26) which affirmatively shows that such conduct had started "early in the year 1954." It is true that, as indicated in the Intermediate Report (I. R., p. 51, line 30 through p. 52, line 17), Whaley received a letter dated July 21, 1954, about the time of the Board hearing of July 17-19, 1954, admonishing him for circulating false rumors, but, as indicated in the

---

[10]The record testimony shows that on the occasion when Whaley and Thomas Everett discussed the matter of his circulating rumors about the Respondent maliciously ruining his health, Whaley merely denied that he said it "that way." (Tr., p. 28.) This statement coupled with his failure to expressly deny circulating any rumor lends credence to the record testimony that Whaley did in fact circulate rumors detrimental to the interests of the Respondent which had a disturbing and disruptive effect on the employees.

text of the letter, the rumors which prompted this letter were *different* from the rumors he had theretofore been charged with.



circulating — a new set of rumors. These rumors also appear to be different from the rumors witness Cribbs testified Whaley told her, i. e., to the effect, "if the union hadn't helped any way it had brought us a raise" (Tr., p. 56), which statement Cribbs at the time repeated to witness Magee, who so testified. The Trial Examiner also charges that Whaley's "so-called inability to perform his duties" was "suddenly discovered" about the time his interest in the union became known. There is no record evidence to support this conclusion. As pointed out, Whaley became a member of the union in early 1954 and his services were not terminated until almost a year later. The evidence shows that Whaley committed errors in the performance of his record-keeping duties, and that his prime responsibility as warehouse foreman was to keep proper and correct records of materials; moreover, according to the uncontradicted testimony of his supervisor, Luther Everett, Jr., these errors increased in frequency during the last two or three months of his employment to the point of becoming a nuisance. In addition, the record shows that Whaley sustained a back injury, which apparently aggravated a previously existing back condition, shortly before his employment was terminated. Notwithstanding the fact that evidence was introduced to show that if the statements set forth in the workmen's compensation suit filed at his behest were true,

Whaley could not, having suffered such alleged permanent injury prior to his discharge, adequately performed the lifting of heavy bales of rubber which he acknowledged he was required to do, the Trial Examiner, by



"demeanor" evidence, concluded that Whaley was "ready, willing and able" to perform his duties as a "supervisor." The only evidence in the record which could possibly serve as a basis for such finding was Whaley's uncorroborated, self-serving statement that he was able, as far as he knew, to do what he was supposed. Respondent contends that in view of the testimony regarding Whaley's inability to adequately perform his duties, and the evidence disclosing his workman's compensation claim alleging a permanent disability, the burden was upon the General Counsel to adduce evidence to affirmatively show that Whaley was physically able to perform his duties at the time his employment was terminated. As hereinafter set forth, following the hearing in the Board proceeding, Whaley recovered a very substantial sum of money as a result of his claim of permanent disablement, which serves as evidence of the fact that he suffered a substantial injury prior to the termination of his employment.

The Respondent respectfully requests that, in reconsidering the record evidence, the Board also consider the sworn testimony, which has just been made available to the Respondent, given by Whaley in the formal deposition taken in his workman's compensation case as to the extent and

duration of his physical injuries. As fully disclosed in the Motion for Remand, *infra*, Whaley's testimony discloses that at the time the deposition was taken, which was approximately eight months after the occurrence of the injuries, his physical condition would not permit him to perform the type of functions he had previously been required



to perform for the Respondent. In requesting that the Board consider such evidence at this time, the Respondent is guided by the reasoning of the Court in the *N. L. R. B. v. Vail Manufacturing Company* case, *158 F. 2d 664 (C. A. 7), cert. denied, 331 U. S. 835*, upon which the Board and Trial Examiner rely herein, to the effect that in determining whether the Act has been violated, a court must view all events, including the events happening subsequent to the alleged violation.

The Trial Examiner states that "the case against (Whaley) for discharge for cause is *too flimsy*." By way of recapitulation the Respondent earnestly points to the following record evidence:

(1) That Whaley joined the Union in early 1954, and that his union activities, which were unprotected under the Act, were known to the Respondent on or about such time;

(2) That all parties testifying on behalf of the Respondent actively associated Whaley with circulating untrue and unfounded rumors to the detriment of the Respondent; that,

as the Intermediate Report discloses, some of the rumors antedated his testimony at the Board hearing, that Whaley never expressly denied circulating any rumors;

(3) That Whaley's statement that he did not think he was "fighting management" "too much" is an admission that he was, in fact, fighting management, which fact the evidence bears out;

231

20

(4) That Whaley admitted making mistakes in the performance of his record-keeping functions, and that he did not deny that these errors increased during the last two or three months preceding his discharge;

(5) That Whaley suffered a back injury, or a recurrence of a previous injury, a few days prior to the termination of his employment, and that in the performance of his duties he was required, on occasion, to lift heavy bales of rubber.

The Respondent further submits that, in view of this record evidence, the only reasonable inference is that, as a union adherent, Whaley was malcontented, disgruntled, and displeased with Respondent's management and policies, and that his endeavors, as evidenced by the testimony, were allied with the union movement, rather than with the productive output of Respondent's plant. Under these circumstances, it is only reasonable to assume that, due to his dissident attitude, the accuracy of his record-keeping functions declined. Moreover, the evidence disclosing the back injury

suffered by Whaley shortly before the termination of his employment lends weight to the argument that he was not physically capable of performing his duties as the job requirements demanded. When all of the factors are considered together, it is readily apparent why the Respondent considered Whaley an unsatisfactory employee for the highly responsible position he held.

The Trial Examiner, however, in glossing over these evidentiary facts, places great emphasis on the fact that the termination of Whaley's services followed shortly after he



gave testimony at a Board hearing. The Trial Examiner's reasoning in this respect presupposes certain facts and is, on its face, illogical and fallacious. As stated, Whaley's union activities commenced approximately a year before his services were terminated, and such activities were known to the Respondent. At this time, if the Respondent had so chosen, in order to curb the union movement, it could have discharged Whaley with impunity. Thereafter, the Respondent could have discharged Whaley before the Board hearing for spreading false rumors had it so desired.

The Respondent respectfully submits that if it had wished to discharge Whaley for giving testimony adverse to its interests, the logical time to have done so would have been after his testimony at the July, 1955, hearing. Unless the power of clairvoyance can be attributed to the Respondent, it would have had no occasion upon the conclusion of this

hearing to presuppose that the case would be remanded and that Whaley would again be called to testify. If it is argued that the Respondent could foresee the Board's remand, then had it been motivated by a desire not to have Whaley testify, it could, by discharging him at that time, possibly have defeated any attempt by the General Counsel to call him at a later date — there is the strong possibility that this course of action would have made his later whereabouts unknown, or placed him beyond the powers of a subpoena call. It is quite obvious that to keep him employed only insured that he would be available for any purpose that the General Counsel deemed necessary. An-

233

22

other significant fact is that none of the Respondent's officials said anything to Whaley about his testimony after the hearing. In fact, nothing was said to him until September 9th and 10th when he talked with L. M. Everett, Sr., and Respondent's counsel concerning his prior testimony. It is apparent from Whaley's testimony that he was *never threatened* with loss of employment if he refused to change his testimony. Whaley readily admitted that he was not asked to tell a falsehood, and the record testimony discloses that at all times the Respondent's president and counsel were apparently trying only to elicit from him the truth concerning the alleged statement that constituted the basis for Whaley's adverse testimony. In view of the false rumors that Whaley had been spreading, the action taken by the Respondent appears entirely plausible and reasonable, particularly when it is considered that the party, Talley, to

whom the statement that employees who joined the Union would be fired was allegedly made — it being remembered that Whaley only claimed to have overheard such statement — testified in Case No. 16-CA-742 (See Tr., p. 342) that such statement was not in fact made. L. M. Everett, Sr.'s statement, or admonishment, to Whaley at the time to the effect that if it was proved Whaley was lying, his services wouldn't be needed any more, appears to demonstrate that Everett was in fact searching for the truth. There is no record evidence to indicate to the contrary. It would seem at this point that, inasmuch as the Respondent's president and counsel had full knowledge that Whaley would not change his prior testimony and that his continued employment could only be injurious to them



in this respect, the only logical course of action would have been to discharge him at that time. However, this action was not taken. Whaley's testimony shows that nothing else was said to him about the matter until the day before the hearing in January, 1955, when the Respondent's counsel merely asked if he would consider changing his prior statement. This is all that was ever said about the matter. In view of these facts, the record testimony to the effect that Whaley's employment was purposely not terminated until after the last Board hearing is entirely logical — certainly there is no plausible reason why the Respondent would have retained his services otherwise.

The Trial Examiner, as authority for his finding that the Respondent's conduct violated Section 8 (a) (1), and 8 (a) (4) of the Act, cites the following cases: *N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209 (C. A. 5); N. L. R. B. v. Vail Manufacturing Co.*, supra. A review of these cases discloses that the factual situations involved therein are clearly distinguishable from the case at hand. In both of the cited cases there was record evidence disclosing that the respondents therein had engaged in conduct which demonstrated a very strong anti-union animus, and that such respondents had committed numerous violations of Section 8 (a) (1) and 8 (a) (3) of the Act; whereas, in the case at hand, with the exception of Whaley's uncorroborated statement, the record is completely devoid of *any evidence* showing anti-union animus or activity on the part of the Respondent. In the *Talladega Cotton* case, there was evidence (1) of unlawful interrogation, (2) of threats



against the employees for their union activity, (3) of the discriminatory demotion of one employee, (4) of discriminatory discharge in violation of Section 8 (a) (3) of the Act, and (5) that supervisory employees were discharged for refusing to engage in unfair labor practices on the part of the employer. The Board, under this rampant pattern of anti-union animus and discriminatory conduct stated in its decision as follows:

> "In these circumstances, where, as here, the discharges followed immediately on the heels of the

> Union's victory in the Board-conducted election, the discharges plainly demonstrated to rank and file employees that this action was part of its plan to thwart their self-organizational activities and evidenced a fixed determination not to be frustrated in its efforts by any half-hearted or perfunctory obedience from its supervisors. In our opinion, *the net effect of this conduct was to cause non-supervisory employees reasonably to fear that the Respondent would take similar action against them* if they continued to support the Union. For this reason, we find that the discharges violated Section 8 (a) (1) of the Act."

Thus, the Board in finding that Section 8 (a) (1) of the Act had been violated used what might be termed the "net effect" test, with the Board expressly stating that the "net effect of this conduct was to cause non-supervisory employees *reasonably to fear* that the Respondent would take similar action against them if they continued to support the Union." (Emphasis added.) The Board concluded that "*For this reason,* we find that the discharges violated Section 8 (a) (1) of the Act. It is apparent from a reading of the Court's decision that, in enforcing the Board's rem-



edial order, the Court was following the rationale utilized by the Board. Inasmuch as the record in this case is completely devoid of any evidence indicating that the Respondent engaged in any type of conduct proscribed by the Act

insofar as the rank and file employees are concerned — in fact, with the exception of Whaley's uncorroborated statement to the contrary, *there is not a scintilla of evidentiary matter* which discloses opposition to any union organizational activities. Moreover, *there is no evidence in this case* that any statement was made to anyone regarding Whaley's discharge to indicate, or from which an inference could reasonably be drawn, that the termination of Whaley's employment had any connection whatsoever with his testimony given at a Board hearing. The Respondent respectfully urges that when the facts are viewed in this light, it is apparent that, under the Board's "net effect" test, the General Counsel has failed to prove a *prima facie* case.

A review of the facts in the *Vail Manufacturing Co.* case, upon which the Trial Examiner also relies, discloses that, as in the *Talladega Cotton Factory* case, there were widespread violations of Section 8 (a) (1) and 8 (a) (3) of the Act. The evidence in the *Vail* case disclosed that, in addition to the discharge of supervisory employees, the respondent therein *inter alia*, (1) engaged in interrogation of the rank and file employees, (2) threatened to "close the



doors" in the event of unionization, and (3) actually discharged 23 employees — all union members. The Court in the *Vail* case expressly took cognizance of the "active and energetic anti-union campaign" and emphasized the fact that the "Respondent's whole course of conduct was intended to thwart or destroy union activities at its plant." A study

of the *Inter-City Advertising Company* case, *89 NLRB 1103*, also relied upon by the Board and the Trial Examiner, discloses that (1) employees were threatened with loss of employment; (2) that employees were interrogated concerning their union membership and activities; (3) that the employer threatened to close down its station to prevent unionization; (4) that the employer spied on the activities of the employees; (5) that the employer discharged employees; (6) that the employer demoted an employee, and (7) that the employer refused to bargain in violation of Section 8 (a) (5) of the Act.

In reviewing the cases cited by the Trial Examiner, it is apparent that the facts upon which both the Board and the courts relied are inapposite to the facts of the case at hand, because there is no evidence that the Respondent herein attempted to thwart the union activities in any manner whatsoever. In fact, there is no evidence that any employee even associated the termination of Whaley's employment with the fact that he gave adverse testimony at a Board hearing.



Under the foregoing circumstances, the Respondent submits that the General Counsel has failed to prove a *prima facie* case herein that Whaley's employment was terminated because he gave testimony adverse to the interests of the Respondent at a Board hearing. The Respondent further submits that if the Board is of the opinion that the General Counsel has, on the record in this case, proved a *prima facie*

case, the findings, conclusions, and recommendations of the Trial Examiner are not supported by the substantial evidence on the record as a whole. The Respondent, therefore, respectfully requests that the Board reconsider its Decision and Order, and that, upon the basis of the record testimony, it vacate such Decision and Order and dismiss the complaint herein in its entirety.

## II. MOTION FOR REMAND

As discussed herein, the evidence discloses that Whaley suffered a back injury shortly before the termination of his employment. The record shows that on June 2, 1955, Whaley filed suit in a state court seeking a recovery on his back injury. In his petition in such suit Whaley alleged, *inter alia*, (1) that he "had been unable to perform the normal tasks of a workman in his employment and had been unable to do any manual work or labor whatsoever"; (2) that he "has lost the use of his back, as a matter of fact, the ability to do any work whatsoever"; and (3) that he is unable to perform any kind or character of manual



work to which he has been accustomed (Tr., pp. 34-35). Notwithstanding this record evidence, and the fact that Whaley was required, on occasion, to lift heavy bales of rubber, the Trial Examiner, by "demeanor" evidence, concluded (see I. R., p. 30-33, p. 53, and p. 54, lines 1-4) that at the time Whaley's services were terminated he was ready, willing, and able" to perform his duties as a supervisor.

The Respondent would respectfully show the Board that on November 7, 1955, a judgment was entered in the 14th Judicial District Court of Dallas County, Texas, which awarded Whaley the amount of $2,602.50 in settlement of his suit alleging permanent disability suffered while in the employment of Respondent. The Respondent notes for the Board's enlightenment that the amount of recovery had by Whaley represents, or is equal to, under the Texas Workman's Compensation Law which allows $25.00 a week for each week of disability, the amount an employee would be entitled to receive for approximately 104 weeks of disablement. The Respondent would also show the Board that in the formal deposition taken on September 16, 1955, in that case, which was approximately eight months after the termination of his employment, Whaley testified under oath as follows:

> (1) That in the interim period between the termination of his employment by the Respondent and the date he was employed in the position he held at the time his deposition was taken, he applied for unem-



> ployment compensation, and at that time he informed the Texas Employment Commission, "I was for light work. I asked for light work. I couldn't do heavy work."[11]

---

[11]See Exhibit A, which is a photostatic copy of page 6 of Whaley's deposition.

(2) That Whaley suffered a neck injury in 1953 for which he recovered, after attorney fees, approximately $1,600 (total amount paid in settlement of Whaley's claim for injuries in this matter amounted to approximately $2,400.00).[12]

(3) That as a result of the injury suffered by Whaley in this case, he walks stooped over and that "since this last injury I couldn't straighten up on account of the injury across my kidneys, that I had this last time." "In fact, I couldn't lay on my stomach at all now, after this last injury."[13]

(4) That Whaley suffered two other back injuries while in the Respondent's employ, such injuries occurring approximately five and seven years ago.[14]

(5) That, in answer to the question, "When did they fire you?", Whaley testified "Because I was getting crippled and wasn't able to do as much as they wanted me to, to start with."[15]

(6) That in describing how his injuries occurred, Whaley testified as follows:

---

[12]See Exhibit B, which is a photostatic copy of page 10 of Whaley's deposition.

[13]See Exhibit C, which is a photostatic copy of page 11 of Whaley's deposition.

[14]See Exhibit D, which is a photostatic copy of page 13 of Whaley's deposition.

[15]See Exhibit E, which is a photostatic copy of page 11 of Whaley's deposition.

"I was straightening up some skids with a fork truck and there was — has a metal bottom in it and when that gets damp or wet or something, it gets real



slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped over against the sides — it has got ribs up and down it, you know, and it caught me right in the center of my back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions."[18]

(7). That in describing the extent of his injuries, Whaley testified as follows:

"Well, the right arm — I can't hardly use it —

---

[18]See Exhibit F, which consists of page 17 of the deposition, which is also marked Exhibit E, and page 18.

raise it up — can't hardly pick up anything with it to amount to anything, on account of too much pain there to raise it up. And I can't lay down on my back at all — I mean on my stomach at all, and very little on my back on account of the pain across my kidneys — when I lay down on my back it kind of tends to straighten my back out to where it is hurt there and the pain is severe. I can't hardly sleep long at a time; I have to change positions about every hour and a half during the night. I don't get much rest as it is; I lay there and I have got to move and turn over."

(8) That, although it appears that the duties of the job Whaley was holding at the time his deposition was taken were less strenuous than the duties he was required to perform for the Respondent, it was necessary that his wife come out to the job so that "(Whaley) can make a day out there."

**242**

31

Thus, it is apparent from Whaley's sworn testimony[17]

---

[17]The Board may also wish to consider whether or not the sworn testimony set forth in Whaley's deposition discredits the testimony given by Whaley, which was likewise given under oath, at the Board hearing. There arises one indisputable fact: *the only witness called by the General Counsel to offer testimony in support of the allegations set forth in the complaint, gave different testimony on the same subject matter on two occasions while under oath to tell the truth and only but the truth.* This indisputable fact must lend weight — particularly in light of the Court's reasoning in the *Vail Manufacturing Co.* case, *supra*, that a court must also view the events happening subsequent to the alleged unlawful conduct which is the gravamen of a Board complaint — to the argument that the General Counsel has failed to prove a *prima facie* case herein.

that he suffered extensive physical injuries which rendered him incapable of performing the functions he was required to perform, and which he would be again required to perform if reinstated to his former position. In fact, it is also apparent, in view of the other injuries to Whaley's neck and/or back, that any attempt to perform the daily lifting of heavy objects might only serve to cause additional injury to an already aggravated back condition; and that, if such is not now the case, such action might only serve to fully incapacitate Whaley and render him a complete cripple. Moreover, it is quite possible that, in the attempt to perform such functions, Whaley might, from dropping, etc., cause damage to the property of the Respondent or others, or, more important, might cause serious physical injury to some guest or invitee on the Respondent's premises or to some other employee for which the Respondent would, of course, be liable.

In view of the foregoing, the Respondent respectfully requests that the Board, in the event it denies the Respondent's Petition for Reconsideration, remand this proceeding



for the purpose of taking testimony on the question of whether or not Whaley is in fact physically capable of performing the functions of the job to which it has been ordered that he be reinstated, and whether or not, on the

basis of competent medical advice, such action is to be recommended or even sanctioned.

Respectfully submitted,

BETTER MONKEY GRIP COMPANY,
*Respondent.*

By HERBERT S. BONNEY, JR.
HERBERT S. BONNEY, JR.,
1133 Fidelity Union Life Building,
Dallas, Texas,
*Counsel for Respondent.*

A copy of this Petition for Reconsideration and Motion for Remand has been served upon the following persons by registered mail: Mr. Harrison C. Thompson, Jr., Counsel for General Counsel, 300 West Vickery, Fort Worth, Texas; Mr. D. H. Woodall, Representative of Upholsterer's International Union of North America, AFL-CIO, 2118 Volga Street, Dallas, Texas.

A Yes, sir.

Q Did you have to tell them you were ready to go to work?

A Yes, sir.

Q Did you have to tell them ou were willing to go to work?

A Yes, sir.

Q Did you have to tell them you were able to go to work?

A I was for light work; I asked for light work. I couldn't do heavy work.

Q Did you get full benefits for unemployment during that five weeks?

A Yes, sir.

Q Have you ever applied for unemployment benefits at any other time?

A Well, it has been a long time.

Q How long ago?

A First, twenty-second, 1940, I believe.

Q 1940?

A I think that is what it reads.

Q Whereabouts do you live, Mr. Whaley?

A At Arlington.

Q Where, in Arlington?

A 815 Scott Drive.

Q How long have you been living there?

I got hit, you know, it popped my head backward and forward and made me stiff-necked.

Q Did you claim you were permanently disabled?

A No, sir.

Q What?

A No, sir.

Q Well, what did you claim?

A Well, just that I wasn't able to do the work that I used to do because it was too painful for me and I couldn't rest at night.

Q Did you get any money on account of that suit?

A Yes.

Q How much?

A Well, to my part I got Sixteen Hundred.

Q Did you work while that suit was pending?

A Yes, sir.

Q You worked right along?

A Yes, sir.

Q Regular work?

A Yes, sir.

Q And your part was Sixteen Hundred, is that right?

A That is what I netted, yes, sir.

Q Well, didn't you claim you were permanently disabled in that lawsuit?

A Not that I remember of.

Q I notice when you walk, you sort of walk stooped over?

A Yes, sir.

Q How long have you been walking like that?

A Well, since this last injury I can't straighten up on account of the injury across my kidneys, that I had this last time.

Q Well, you walked stooped over after that other accident, didn't you?

A Very little; it was mostly because of my neck.

Q Well, you walked stooped over and said you couldn't walk standing up, didn't you, in that other lawsuit?

A Well, no, not like I do now.

Q Well, what is the difference?

A Well, there is quite a bit of difference. I just can't — just bent over more than I ever was. In fact, I can't lay on my stomach at all now, after this last injury.

Q And it is your testimony that the only thing you were complaining of at that time is your neck?

A Yes, sir.

Q Is that right?

A So far as I know, it is.

Q Well, you know where you were hurt, don't you?

A Well, it was right at the base of my neck, is where it was.

Q Is that the only place where you had pain?

A Yes, the x-ray man.

Q How did you happen to go to those doctors?

A I was sent there by Mr. Harless.

Q Are you satisfied with the treatment they gave you?

A Yes, sir.

Q You thought they were pretty good doctors?

A I think so.

Q Well, have you had any other injuries of any kind?

A Only those other two back injuries that I got out at the plant. They had — there was a report on that where I went up to Altick up there.

Q When was that?

A I believe one of them was about five years ago and the other about seven.

Q Did you lose any work?

A No, sir.

Q Your back has just been bothering you for years, hasn't it?

A Only when I got hurt out yonder — the only time it has bothered me to amount to anything.

Q Well, when were these other two back injuries?

A They were out at the Monkey Grip.

Q When?

A Along about five years ago and the other about seven, just about, approximately — I don't know for sure.

don't know which, but they didn't give me any reason.

Q When did they fire you?

A Because I was getting crippled and wasn't able to do as much as they wanted me to do, to start with.

Q When did they fire you?

A I don't remember the date exactly.

Q Well, was it just before you went over there for these employment benefits?

A Yes, sir.

Q You worked about a week after you claim you got hurt?

A No, a little bit longer than that, two or three weeks — two weeks, I think.

Q How did you get hurt?

A I was straightening up some skids with a fork truck and there was — has a metal bottom in it and when that gets damp or wet or something, it gets real slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped ove against the sides — it has got ribs up and down it, you know, and it caught me right in the center of my

back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions.

Q Didn't you usually use a fork truck out there in your work?

A Well, I had used it for three or four years and then they got a man to drive it altogether. Well, they decided to move him to another job and they were going to put another boy on it; they moved him on to another job Wednesday and they were going to put another boy on it on Monday; so I had to have some work done with it, so I used it myself then.

Q All you were doing was stacking these skids?

A Stacking skids, yes, sir.

Q Did somebody tell you to do that?

A No, sir, I was my own boss out there. I do everything that I see that needs to be done, I do it.

Q What was your job out there?

A Receiving clerk.

Q You say you fell into a bin?

A Yes.

Q And it was next to a loading dock?

A Yes.

Q And you fell down into the bin from the fork lift?

250

## ORDER

(Number and Title Omitted)

On April 30, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on July 23, 1956, the Respondent filed a petition for reconsideration of the said Decision and Order, and, in the alternative, a motion for remand. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said petition for reconsideration be, and it hereby is, denied on the ground that nothing has been advanced that was not previously considered by the Board; and

IT IS FURTHER ORDERED that the alternative motion for remand be, and it hereby is, denied as it relates to a question of compliance and is therefore premature at this time.

Dated, Washington, D. C., Aug. 10, 1956.

By direction of the Board:

Frank M. Kleiler

Executive Secretary

---

[1] 115 NLRB No. 186

251

(Affidavit of Service Omitted)

* * * *

252

(Return Receipts Omitted)

* * * *

No. 4061 LIBRARY SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 27 1957

UNITED STATES

# COURT OF APPEALS

FIFTH CIRCUIT

## No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

U. S. COURT OF APPEALS
FILED
NOV 5 1956
John A. Fechan, Jr.
CLERK

# INDEX


Page

Witnesses (For General Counsel):

Robert L. Whaley

Direct Examination ..... 8

Cross Examination ..... 18

Redirect Examination ..... 28

Witnesses (For Respondent):

Altha Lucille Cribbs

Direct Examination ..... 34

Cross Examination ..... 36

Redirect Examination ..... 42

Recross Examination ..... 43

Lila Belle Magee

Direct Examination ..... 44

Robert L. Whaley

Direct Examination ..... 46

Thomas H. Everett

Direct Examination ..... 52

Cross Examination ..... 61

Redirect Examination ..... 68

INDEX — Continued


Page

Luther M. Everett, Jr.

Direct Examination ..... 69

Cross Examination ..... 79

Respondent's Exhibit A ..... 87

Respondent's Exhibit B ..... 88

Respondent's Exhibit C ..... 89

Respondent's Exhibit D ..... 90

Respondent's Exhibit E ..... 91

Respondent's Exhibit F ..... 92

General Counsel's Exhibit No. 2 ..... 93

General Counsel's Exhibit No. 3 ..... 95

Respondent's Exhibit No. 1 ..... 97

# JOINT APPENDIX

## UNITED STATES

## COURT OF APPEALS

## FIFTH CIRCUIT

---

No. 16278

---

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

---

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Sixteenth Region

In the Matter of

BETTER MONKEY GRIP COMPANY
and Case No. 16-CA-814
UPHOLSTERERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL

Room 614C,
1114 Commerce Street
Dallas, Texas,
Tuesday, November 8, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a. m.

BEFORE:
ARTHUR E. REYMAN, Trial Examiner.

APPEARANCES:

HERBERT S. BONNEY, JR., Esq., 1133 Fidelity Union Life Building, Dallas, Texas, appearing on behalf of the Respondent.

HARRISON C. THOMPSON, JR., Esq., Room 2093, 300 West Vickery, Fort Worth, Texas, appearing on behalf of the General Counsel.

* * * *

3

# PROCEEDINGS

TRIAL EXAMINER REYMAN:
We'll open the record, gentlemen.

This is a formal hearing before the National Labor Relations Board.

I was designated last Friday as Trial Examiner — my name is Arthur E. Reyman — to hear consolidated cases No. 16-CA-742 and No. 16-CA-814. Before this hearing was opened this morning, Mr. Thompson, counsel for the General Counsel, called my attention to order withdrawing the complaint and notice of hearing in Case No. 16-CA-742.

Now, I understood from a very short discussion I had with the associate Trial Examiner in Washington over the telephone, that the consolidated cases involved first a remand by the Board for a hearing de novo in one case and the other case was a new one to be heard de novo, too, of course.

Now, which is which?

MR. THOMPSON:
Mr. Examiner, by way of explanation —

TRIAL EXAMINER:
16-CA-742, I see, has been withdrawn, that is, there is an order withdrawing the complaint and notice of hearing in that case.

MR. THOMPSON:

That is correct. That is the case that was remanded for a hearing de novo. 16-CA-814 is the case that was to be heard initially for the first time in this proceeding.

* * * *



MR. THOMPSON:

I would like to ask the reporter to mark for identification the following papers which comprise the



formal exhibits in the case: As General Counsel's Exhibit 1-A, charge filed in Case No. 16-CA-814, filed February 21, 1955, signed by D. H. Woodall in behalf of the union;

* * * *

As General Counsel's Exhibit 1-E, respondent's answer in Case 16-CA-814, dated October 18, 1955;

As General Counsel's Exhibit 1-F, an order withdrawing the complaint and notice of hearing in Case No. CA-742, dated November 4, 1955, signed by Edwin A. Elliott, Regional Director;

* * * *

MR. THOMPSON:

With the preliminary matters, yes, sir, except for one thing, with respect to Paragraph 4 of the complaint, dealing with the charging union as being a labor organization, the Examiner's attention is directed to Case 16-RC-1447 involving the Better Monkey Grip Company, respondents here, and the Upholsterers' International Union, which was the petitioner in that case and is the charging union in this case.

TRIAL EXAMINER:

I take it the Board certified the union in that case?

MR. THOMPSON:

No, sir, they did not. This is merely the decision and direction of election to which I am referring, wherein the Board determined that this union was a labor organization.

TRIAL EXAMINER:

Was that a reported case?

MR. THOMPSON:

No, sir, but I have extra copies of the decision and direction of the election. It was not a reported case, I don't believe.

TRIAL EXAMINER:

What was the date of the decision?

6

MR. THOMPSON:
June 3, 1954. An election was held.

* * * *

8

MR. BONNEY:
We want to file a motion, dictate it, to dismiss this proceedings on the following grounds and with respect to the following parts of the complaint, to-wit:

(1) To all of the complaint, because the complaint under Case No. 16-CA-814 was, by an order which is in the record, consolidated with Case No. 16-CA-742 and they became one case and that case was ordered withdrawn by order of the Regional Director, and we believe that perhaps technically the whole case is thereby withdrawn.

(2) To the entire complaint because it is not alleged that Whaley is an employee of the company as defined in the Act.

(3) To Paragraph 8 of the complaint because neither the complaint nor Paragraph 8 alleges that Robert L. Whaley is an

9

employee or was an employee of respondent and because it relies upon Section 8 (a), Subsection (4) of the Act, which only applies to the employees as defined in the Act.

Wherefore respondent prays that the complaint be dismissed as set out in this motion. Better Monkey Grip Company, by Herbert S. Bonney, Jr., Attorney.

* * * * *

12

MR. THOMPSON:
Will you stipulate with me that Mr. Whaley was a supervisor within the meaning of the Act?

MR. BONNEY:
Yes, sir.

MR. THOMPSON:
All right, General Counsel and counsel for the respondent hereby stipulate that the person named in the complaint as Robert L. Whaley was employed by the Better Monkey Grip Company as a supervisor within the meaning of the Act.

TRIAL EXAMINER:
That's agreeable?

MR. BONNEY:
We agree.

* * * *

ROBERT L. WHALEY,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Thompson) . . .

* * * *

Q Are you the same Mr. Whaley named in the charge in this case?

A Yes, sir.

Q Have you ever been employed by the Better Monkey Grip Company?

A Yes, sir.

Q About when did you go to work for them, Mr. Whaley?

A About 1939.

Q When did you cease working for them, Mr. Whaley?

A In 1955.

Q What was your job with the company, Mr. Whaley?

A I was receiving clerk and warehouse foreman.

Q While employed by the Better Monkey Grip Company, did you become interested or associated with a labor union?

A Yes, sir.

Q About when was that?

A It was in, sometime in March, I believe.

Q What year?

A '54.

Q I direct your attention to sometime during the month of April 1954, Mr. Whaley. Did you talk to any company officials concerning your relationship with the union in the month of April '54?

A Mr. Everett, I believe.

Q Which Mr. Everett?

A Mr. L. M., Sr.

Q Who is Mr. L. M. Everett, Sr.?

A He's president of the company.

Q What did you say to Mr. Everett, if anything, concerning the union?

A Well, at that time, why, he was — he came out to the warehouse where I was and wanted to know what I thought about the union, and stuff like that. We discussed it out there, and he told me that he didn't know why we did want to go that way, but if we did he would be willing to go along with it. He didn't know why, he couldn't figure out why that we all wanted to do that.

Q Did you tell him you were in favor of the union?

A Yes, sir.

Q All right, sir; I direct your attention now to the month of July 1954, specifically on or about the 17th of July 1954. Did



you testify in a hearing involving the Better Monkey Grip Company on that date?